This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

STANFORD LAW
LIBRARY

IN
MEMORY OF
HENRY VROOMAN

D.A. MERON-PIERSON CO. Ltd
NEW ORLEANS
PATENTED
MADDOX METHOD BINDING

D E
A R
921

A TREATISE

ON THE

LAW OF USURY;

TO WHICH IS ADDED,

THE STATUTES OF THE SEVERAL STATES RELATING TO INTEREST NOW IN FORCE:

TOGETHER WITH

A [illegible]EST OF ALL THE DECISIONS,

AND

AN INDEX TO THE REPORTED ADJUDICATIONS FROM THE STATUTE OF HENRY VIII. TO THE PRESENT TIME.

BY J. W. BLYDENBURGH,
COUNSELLOR AT LAW.

NEW-YORK:
JOHN S. VOORHEES,
CORNER OF CEDAR AND NASSAU STREETS.
1844.

Entered, according to Act of Congress, in the year 1844, by
JEREMIAH W. BLYDENBURGH,
in the Office of the Clerk of the District Court of the Southern District of New-York.

John F. Trow & Co., Printers,
38 Ann-street.

TO THE

HON. ROBERT H. MORRIS,

Mayor of the City of New-York,

THIS WORK IS DEDICATED,

AS A

TRIBUTE OF RESPECT AND GRATITUDE,

BY HIS FRIEND AND PUPIL,

THE AUTHOR.

PREFACE.

THIS work is designed as a supplement, not a substitute, to the works of Powell, Comyn and Ord. The numerous decisions since the publication of these books have rendered something of this kind convenient if not necessary; and the total neglect of those competent to such an undertaking, would seem to have left the field fairly open to "another adventurer." There is no American work on usury. Comyn on usury, first appeared in 1817; and, from its systematic arrangement and critical accuracy, has ever been regarded of standard authority. But the ingenuity of lenders in devising new schemes for obtaining exorbitant profits, without incurring any risk of loss, has called forth repeated adjudications upon new distinctions, and the ever-varying tone of popular prejudice has influenced not only legislators and juries, but even judges, until the usury laws of the different states and the decisions thereon have become curiously checkered and whimsically dovetailed. In collecting the American cases, it was intended to adopt Comyn's work as a model, but in all the practical details it was found utterly impossible, from the want of uniformity in the respective states. With the exception of the different rates of interest, however, what is usury in one state is usury in another; the difference is in the consequence of it. Such general principles, therefore, as could be traced

to any common source, have been arranged upon Comyn's plan. The punishment of usury by informations *qui tam*, has been taken entirely from his work, and the few subsequent decisions on such actions added to that chapter. After which the statutes of the several states now in force have been copied, and the decisions under them from the respective State Reporters follow the statutes.

Mr. Kelly, of London, in 1836 published a work on usury; but the design of that gentleman appeared to be rather an essay on the policy of the law, than an attempt to illustrate and explain it; as he added nothing to the works of his predecessors. It might therefore be expected that something should be said in reply to the continued attempts of essayists to show the inutility of statutes against usury. But this volume emanates from no politician. The best argument in favor of usury laws is perhaps the gigantic efforts of usurers to repeal them. The more numerous class of borrowers do not feel their inconvenience; and the experience of the last half century, to say nothing of antiquity, conclusively shows, that however they may be varied by temporary excitement, they can never be permanently repealed. It will be seen that there is no state in the union, with perhaps the exception of the Plymouth colony of Massachusetts, that has not attempted to do without them, and signally failed. Some do indeed question their moral tendency, and to such, no argument will be so effective as the payment by themselves of exorbitant interest. It was this that brought the legislators of Alabama to their better judgment in 1819. It was this that introduced Poindexter's code in Mississippi in 1822, and aroused the interior of New York in 1837. And it will be this that will cause to be re-enacted severer penalties after any future abolition of the laws against usury. But there is still another class of men, who, however much they may believe in the necessity of such laws, feel unwilling to plead the statute after

having promised to pay the extra interest. Are they not under a prior engagement to vindicate the law? Do they feel as much repugnance in a beggarly resort to the bankrupt or insolvent acts to be discharged from legal creditors after having wasted their substance in the payment of illegal demands? The position cannot be too broadly laid down, that he who successively pays usury must eventually fail. And the pretended honesty of those moralists who would refuse to plead usury because they have promised to pay it, is a fit conduit for the unauthorized transfer of honest men's property to the payment of other men's illegal claims. There can be no more money to loan at one rate of interest than another. Capital is always avaricious, and those who possess it, can be compelled to employ it, if others without it would but let them alone. Like the capitalists of Europe, they will lend at legal interest, in preference to consuming their substance in idle expenditure.

In the following sheets I have obtruded but few observations of my own, and those, if not always correct, are at least supported by authority which is in most cases cited. I do not aspire to have shown what the law is, but where it may be found. And if an inquirer shall by this volume find his labor lessened—if, for any particular here touched upon, he have to examine a dozen volumes instead of a hundred, he may consistently excuse the faults, and forbear to condemn the undertaking.

A TABLE

OF THE PRINCIPAL ADJUDICATIONS ON THE SUBJECT OF USURY.

The point decided in each case will be generally found on reference to the citations in this work.

A

	Page.
Abraham, qui tam v. Bunn, Burrows R. 2251	138
Ackland v. Pearce, 2 Campbell R. 599	90
Aeby v. Rapelje et al. 1 Hill R. 9	242
Adderly v. Wise, 2 Levintz R. 164	131
Alwood v. Whittlesey, 2 Root R. 39	164
Anderson v. Rapelje, 9 Paige R. 483	253
Andrews v. Pond, 13 Peters R. 483	159
Archibald v. Thomas, 3 Cowen R. 284	32, 235
Armstrong v. Campbell, 3 Yerger R. 201	68
Ashenhurst v. James, 2 Atkins R. 371	105
Astor v. Price et al. 7 Louisiana R. N. S. 409	47
Atkinson v. Ex'r of Scott, 1 Bays R. 307	80
Auriel v. Thomas, 2 Term R. 52	58
Adlington v. Cann, 3 Atkins R. 154	
Ancaster, Duke of, v. Pickett, Brown's Chan. cases, 151	43
Anderson v. Maltby, 2 Vesey, Jr. R. 248	35
Astley v. Reynolds, Strang R. 915	
Ainsworth ex parte, 4 Vesey, Jr. R. 678	
Anonymous, 1 Bulstrode R. 17	87
" 1 Ventris R. 38	202
" 12 Modern R. 493	107
" 3 Salked R. 58	180

B

Bacon v. Norton, 5 Day R. 128	94, 166
Bank of Burlington v. Durkee, 1 Vermont R.	33, 117, 281
Bank of St. Albans v. Stearnes, 1 Vermont R. 430	33, 281
Bank of Utica v. Smalley, 2 Cowen R. 770	57, 234
" v. Hager, 2 Cowen R. 712	57, 58, 233, 235

Bank of Utica v. Phillips, 3 Wendell R. 408 . . . . 59, 237
" v. Hillard, 5 Cowen R. 153 116
Bank of United States v. Waggener, 9 Peters R. 378 79
Bank of Monroe v. Strong, 1 Clark R. 76 91
Bank of St. Albans v. Scott, 1 Vermont R. 426 117
Bank of Salina v. Henry imp. Pierce, 1 Hill R. 555 . . . 242
Bank of Valley v. Stribling, 7 Leigh R. 26 296
Baldwin v. Norton et al. 2 Connecticut R. 161 168
Ballard v. Oddie, 2 Modern R. 307 180
Banteen v. Smith, 2 Binney R. 146 263
Barbe qui tam v. Parker, 1 H. Blackstone R. 283 135
Barclay v. Walmsley, 4 East R. 55 58
Barnard v. Young, 17 Vesey, Jr. 44 . . . . . 32, 46
Barker v. Vansomer, 1 Brown's Chan. R. 149 . . . .
Barnardiston v. Lingood, 2 Atkins R. 233 . . . . .
Barnard v. Fitzhouse, 9 Modern R. 359 . . . . .
Barnard, Lord v. Saul, Strang R. 498 . . . . . .
Barnes v. Hadley, 2 Taunton R. 184 91
Barnes v. Worlich, Yelverton R. 47 92
Noy 41. Moore 644 . . . .
Croke James 25 . . . . . .
Barnett v. Stone, 3 Espinasse N. P. C. 209 . . . .
Barrington v. Kine, 1 Kebler R. 554 129
Bartholomew v. Yaw, 9 Paige R. 165 . . . . . 112, 252
Bartlett v. Vinor, Carthew R. 251 . . . . . .
Bassett & Prowe's case, 2 Leonard R. 166 102
Batty v. Lloyd, 1 Vernon R. 141 37
Baynham v. Matthews, Fitzgibbon R. 130 . . . . . 112, 131
Baynes v. Fry, 15 Vesey 120 58
Barnes v. Peck, 1 Porter's R. 187 156
Bartlow v. Bonde, 3 Dana R. 595 189
Baxter Adm'r v. Burk, 10 Vermont R. 548 283
Becher's case, Moore, 397. 87
Beckwith v. The Windsor Manufacturing Company, 14 Conn. 594 171
Beaver v. Barstow, 9 Massachusetts, 45 . . . . . 92, 203
Bedo v. Saunderson, Croke James, 440, ... 51, 134, 185
Beddingfield v. Ashley, Croke Elizabeth, 741 . . . .
Beete v. Bidgood, 7 Barnwall & Creswell, 453 . . . . 32, 72
Bell v. Lent, 24 Wendell R. 230 . . . . . 61, 241
Benfield v. Solomons, 9 Vesey, Jr. R. 84 . . . . .
Bennett ex parte, 2 Atkins, 527 . . . . . .
Bennett v. Smith, 15 Johnson's R. 355 227
Bennington Iron Company v. Rutherford, 3 Harrison R. 467 . 219
Benson v. Parry, 2 Term R. 52 57
Bent v. Baker, 3 Term R. 27 138
Benton v. Burgot, 10 Sergeant & Rawle R. 240 265
Berny v. Pitt, 2 Vernon R. 44 37
Bevan ex parte, 9 Vesey, Jr. R. 223 265

Bill v. Price, 1 Vernon R. 467
Birge v. Hubbard, 15 Massachusetts R. 96 . . . . 92, 95
Blanc v. Harrison, Holt's R. 706 51
Bland v. Featherstone, Barnes' 3d ed. 118 137
Bochme v. Aisquith qui tam, 4 Harris & Johnson R. 207 . . 200
Board v. Ackerman, 5 Espinasse N. P. C. 119 114
Boddam v. Riley, 2 Brown's Chan. R. 2
Bodily v. Bellamy, Burrows R. 1094
Body v. Tassell, 3 Leonard R. 205 87
Boldero v. Jackson, 11 East R. 612
Boardman v. Roe, 13 Massachusetts R. 104 205
Bonfield qui tam v. Milnor, Burrows R. 1098 136
Booth v. Cook, 1 Freeman R. 264
Boisgerad v. Forgartu, Brevard MS. R. 273
Boggs v. Bullen, 9 Paige R. 226 253
Borrowdaile qui tam v. Middleton, 2 Campbell R. 53 . 128, 132
Bosanquet v. Dashwood, cases temp. Talbot, 38
Boswells v. Clarkson, 1 J. J. Marshall R. 49 . . . 80, 186
Bosworth v. Perhamus, 20 Wendell R. 1611 . . . 115, 240
Botsford v. Sanford, 2 Connecticut R. 276, . . 88, 91, 95, 167
Boughton v. Bruce, 20 Wendell R. 234. 111
Bowels v. Drayton, 1 De Saussure R. 489 70
Bowie v. Bampton, Strang R. 1155
Brackenbridge v. Brooks, 2 A. K. Marshall R. 335 . . . 68
" 2 Marshall R. 174 181
Brackenbridge v. Churchill, 3 J. J. Marshall R. 11 . 180, 187
Branton v. Dickson, 1 Murphy R. 225 260
Brard v. Ackerman, 5 Espinasse, N. P. C. 119
Braxter v. Willing, 4 Call R. 288 290
Bridge et al. v. Hubbard, 15 Massachusetts R. 96 . . . 205
Brigham v. Moriam, 7 Pickering R. 40 . . . . 88, 207
Brittin v. Freeman, 2 Harrison R. 191 207
Brock v. Thompson, 1 Bailey R. 322 274
Brockway v. Clark, 6 Ohio R, 50 261
Brooks qui tam v. Middleton, 1 Campbell R. 445 . 58, 128, 132
Brown v. Swan, 10 Peters R. 497 17
Brown v. Fulsbye, 4 Leonard R. 43 . . . . . 87, 127
Brown v. Heard, 3 Marshall R. 391 182
Brown v. Oded, 1 Schoales & Lefroy, 115 . . . 185
Brown v. Faussett, 1 Harper's R. 81 272
Brown v. Bunt, 1 Henning & Munford R. 4 . . . 291
Brown v. Barkham, 1 Peere Williams R. 652
Browning v. Morris, Cowper R. 790 113
Brownsword v. Edwards, 2 Vesey, Jr. R. 246
Buckler v. Millard, 2 Ventris R. 108
Buckley v. Guilbank, Croke James, 678
Bull v. Douglass, 4 Munford R. 303 81
Bulwer's Case, 7 Coke R. 57 131

Bunn v. Fanssett, 1 Harper's R. 81 45
Burnett v. Tompkyns, Skinner's R. 348 88
Burns v. Kempball, 24 Wendell R. 360 . . . . . 115, 241
Burton's Case, 5 Coke R. 70 184
Bush v. Gowen, 2 Strang R. 1043 117
Burt v. Given, 4 Harris & Johnson R. 507 200
Bush v. Bush, 7 Monroe R. 53 182
Bush v. Buckingham, 2 Ventris R. 83 . . . . .
Butterfield v. Kidder, 8 Pickering R. 512 207
Butts v. Bondurant, 7 Marshall R. 423 185
Byrd v. Bowie, 5 Louisiana R. N. S. 202 191
Bank of United States v. Dama, 6 Peters R. 51 116
Brayder v. Goulman, 1 Monroe R. 119 183
Berry v. Thompson, 17 Johnson R. 436 109
Brown v. Campbell, 1 Sergeant & Rawle R. 176 263

C

Calliott v. Walker, 2 Anstruther R. 495 58
Cameron v. Campbell, 24 Wendell R. 94 . . . . . 59, 241
Camp v. Bates, 11 Connecticut R. 487 171
Campbell v. Morrison, 7 Paige R. 157 . . . . . 31, 124, 250
Campbell v. Johnson, 4 Dana R. 81 . . . . . 114, 189
Campbell v. Shields, 6 Leigh R. 517 . . . . . 57, 66, 295
Cameron v. Johnson & Hall, 3 Alabama R. 158 157
Caisergues v. Dugarreau, 1 Martin R. 11 191
Carlisle qui tam v. Trears, Cowper R. 671 131
Carstairs v. Stein, 4 Maule & Selwin R. 192 . . . . . 52, 58
Carter & Claypole's case, 1 Leonard R. 307 108
Catesby v. Bishop of Peterborough, Croke James, 141 . . . 135
Catron v. Shaw & Tiffany, 2 Harris & Gill R. 13 198
Cayuga County Bank v. Hunt, 2 Hill R. 635 . . . . . 79, 243
Chandler v. Morton, 5 Greenleaf R. 374 . . . . . 116, 195
Chadbourne v. Watts, 10 Massachusetts R. 121 . . . . . 92, 203
Chapman v. Robertson, 6 Paige R. 627 . . . . . 82, 84, 87, 92, 207
Chapman v. Black, 2 Barnwall & Alderson R. 588 88
Chartain v. Johnson, 2 Bailey R. 574 . . . . . 101, 276
Chesterfield v. Jansen, 1 Atkins R. 301 35
Chibs v. Coleman, 2 Marshall R. 300 181
Childers v. Dean, 4 Randolph R. 406 . . . . . 32, 68, 288
Chur v. Kirkley, 4 McCord's R. 397 274
Church v. Tomlinson, 2 Cowen R. 134 . . . . . 91, 168
Churchill v. Suter, 4 Massachusetts R. 156 116
Call v. Scott, 4 Call R. 492 290
Campbell v. Reid & Grey, Martin & Yerger R. 392 . . . 55, 99, 279
Cave v. Davis, 5 Monroe R. 394 183
Clarke v. Shee, Cowper R. 200 113
Clark v. Rutherford, 3 Murphy R. 237 . . . . . 113, 141, 259
Clarkson v. Depeyster, Hopkins R. 424 69

Clarke v. Garland, 1 Leigh R. 147 292
Clayton's case, 3 Coke, 89 184
Cleaveland v. Loder, 5 Paige R. 557 . . . . 45, 47, 248
Cleaveland v. Dove, 1 Harper's R. 407 . . . . 101, 272
Clyer v. Theyer, 3 Hill R. 564 . . . . . 115, 243
Claque et al. v. their creditors, 2 Louisiana R. 115 . . . 49, 192
Cock v. Jones, Cowper R. 727 . . . . . 112, 117
Cock v. Radcliff, cases temp. Hardwicke, 287 112
Cole v. Savage et al., Clarke's R. 490 125
Coleman v. Childers, 6 Yerger R. 398 279
Collier v. Neville, 3 Devereau R. 30 . . . . 32, 64, 258
Collins v. Walker, Brevard MS. R. 272
Commonwealth v. Frost, 5 Massachusetts R. 53 . . . . 142, 202
Connecticut v. Jackson, 1 Johnson's Chan. R. 13 68, 90, 228, 265
Cockey v. Forrest, 1 Gill & Johnson R. 482 . . . . 63, 198
Cook v. Dyer, 3 Alabama R. 643 . . . . . 96, 158
Cook v. Carnejay & Dyer, 3 Alabama R. 643 157
Cooper v. Coates, 1 Yeates R. 8 265
Cooper v. Sandford, 4 Yerger R. 452 278
Copeland v. Jones, 3 New Hampshire R. 116 214
Coombe v. Miles, 3 Campbell, N. P. C. 553 92
Corie's case, 2 Bland R. 488 84
Corwin v. Harrington, 3 Pickering R. 26 206
Coster v. Dilworth, 8 Cowen R. 299 . . . . . 51, 235
Cowls v. Wilcox, 4 Day R. 108 166
Cowls et al. v. Woodruff et al., 8 Cowen R. 35 170
Cowqua v. Landerburn, 1 Washington Circuit Court R. 525. 265
Cowperthwaite v. Dummer, 3 Harrison R. 258 219
Cram v. Hendricks, 7 Wendell R, 569 61
Crane v. Hubbell, 7 Paige R. 413 . . . . 51, 55, 99, 248
Crawford et al. v. Harvey, 1 Blackford R. 382 178
Crawford v. Denyse & Disbrow, 3 Harrison R. 325 219
Crippin v. Hermance, 9 Paige R. 211 . . . . . 99, 252
Cross v. Kaye, 6 Term R. 543. 136
Croton v. Shaw & Tiffany, 3 Harris & Gill R. 13 81
Crow v. Brown, 12 Modern R. 385 . . . . . 114, 289
Crucher v. Trabore, 5 Dana R. 81 189
Cullen v. Howe, 8 Massachusetts R. 257 . . . . . 39, 203
Cullen v. Johnson, 8 Massachusetts R. 266 . . . . 97, 100, 203
Cuming v. Sibly, Burrows R. 2459 135
Cummings v. Williams, 4 Wendell R. 679 . . . . . 37, 237
Curtiss v. Brund, Conference R. 28 . . . . . 100, 256
Cuthbert v. Haley, 8 Term R. 390 92

D.

Daquin et al. v. Cairon, 3 Louisiana R. 393 . . . . 57, 100, 192
Darling v. Hosmer et al., 16 Massachusetts R. 288 . . . 296

Darrell v. Eaton, 3 De Saussure R. 241 68
Dagnell v. Wigley, 11 East R. 43 58
Defaut et al. v. Strong, 8 Connecticut R. 513 . . . . 55, 170
Denn v. Dodds, 1 Johnson's Cases, 158 225
Depau v. Humphreys, 20 Martin R. 1 . . . . 27, 28, 100, 113, 191
De Grouchy ex parte in re Butler, 2 Deacon R. 79
3 Montague & Ayrton R. 22 89
Dew v. Dew, 3 New Hampshire R. 40 214
Dew v. Power, 1 Schoales & Lefroy R. 182 . . . . 38, 185
Dews v. Cartham, 2 Yerger R. 463 279
Dewar v. Spann, 3 Term R. 425 85
Denham v. Stone, 7 J. J. Marshall, 176 188
Dey v. Dunham, 2 Johnson's Chan. R. 182 . . . . 53, 186, 230
Dickson v. Baldwin, Brevard MS. R. 96
Dickson v. Seriginer, 2 Term Conference R. 501 271
Diffendorffer v. Ward, 3 Gill & Johnson R. 311 69
Dilworth v. Sinderling, 1 Binney R. 488 . . . . . 263, 264
Dix v. Van Wyck, 2 Hill R. 522 . . . . . 107, 109
Dixie's (Sir Wollaston) case, 1 Leonard R. 97 . . . . 129, 134
Dewolf v. Johnson, 10 Wheaton R. 367 . . . . 92, 108, 184, 269
Doe & Davidson v. Barnard, 11 East R. 612 46
Douglass v. McChesney, 2 Randolph R. 209 . . . . 45, 46, 288
Dewdall v. Lennox, 2 Edwards R. 267 . . . . . 36, 254
Dowell v. Vannoy, 3 Devereau R. 43 . . . 105, 141, 257, 258, 259
Dowman v. Butter, Noy R. 73 102
Dozier v. Bray, 2 Hawks R. 257 . . . . . 141, 259
Duke of Ancaster v. Pickett, Brown's Chan. Cases, 151 . . . 43
Dunbar v. Long, 4 Hening & Munford R. 212 . . . . 56, 291
Dunbar's Ex'rs v. Woodcock's Ex'rs, 10 Leigh R. 481 . . . 71
Dunbar v. Wood, 6 Vermont R. 653 282
Duncan v. Maryland Savings' Bank, 10 Gill & Johnson R. 299 . 33, 201
Dunford v. Baritau, 5 Martin R. 504 191
Dunham v. Dey, 13 Johnson R. 40, 16 do. 367 . . . . 52, 59, 226
Dunham v. Gould, 16 " 367 . . . . . 53, 230
Dunscomb v. Bunker, 2 Metcalf R. 8 . . . . . 83, 208
Duvall v. Farmers' Bank, 7 Gill & Johnson R. 61. . . . 201
Drake v. Watson, 4 Day R. 37 . . . . . 140, 165
Dysut v. Logan, 2 J. J. Marshall, 428 . . . . . 114, 182
Dunning v. Merrills et al., 1 Clarke R. 252 88

E.

Eagleson v. Shotwell, 1 Johnson Chan. R. 536 . . . 43, 229
Eames v. Grant, 5 Binney R. 121 263
Eaton v. Bell, 5 Barnewall & Alderson R. 34 265
Edgell v. Stanford, 6 Vermont R. 551 . . . . 96, 101, 282
Edmonson v. Popkin, 1 Bosanquet & Puller R. 270 88

Ellis v. Bibb, 2 Stewart R. 63 . . . . . 33, 115, 155
Ellis v. Warnes, Croke James, 32 90
Ellzy v. Lane, 4 Munford R. 66 287
Ely v. McClung, 4 Porter R. 128 . . . . . 83, 156
Emmett v. Fulwood, 1 Anderson R. 49 133
Enderly v. Gilpin, 5 Moore R. 588 32
Evans v. Stevens, 4 Term R. 228 136
Evans v. Negley, 13 Sergeant & Rawle R. 218 265
Evertson v. Toppan, 5 Johnson's Chan. R. 517 70

F.

Fanning v. Dunham, 5 Johnson's Chan. R. 122 . 53, 123, 230, 231
Fanning v. Pritchell, 6 Monroe R. 81 . . . . . 114, 182
Farrell v. Shaw, 2 Kebler R. 525 133
Farrell v. Shaen, 1 Saunders R. 294 . . . . 102, 202, 204
Farris v. King, 1 Stewart R. 255 154
Fenner v. Sewall, 16 Maine R. 456 196
Fenno et al. v. Sayre & Converse, 3 Alabama R. 458 . . . 157
Fenwick v. Ratcliff, 6 Monroe R. 155, 553 184
Fermor's Case, 3 Coke, 80 122
Fields v. Goram, 4 Day R. 251 . . . . . 94, 166
Fisher v. Beasley, Douglass R. 362 127
Fisher qui tam v. Beasley, Douglass R. 235 128
Fitzgerald v. Park, 4 Little R. 126 183
Fitzhugh v. Gordon, 2 Leigh R. 626 293
Fitzroy v. Gwillim, 1 Term R. 153 130
Fleming v. Mulligan, 2 McCord's R. 173 . . . . . 95, 272
Fleming Exec'r of McDonald v. Bates, 1 Root R. 129 . . 163
Fleming v. Thomas, 4 J. J. Marshall R. 48 187
Flint v. Sheldon, 13 Massachusetts R. 443 204
Flower et al. v. O'Conner, 7 Louisiana R. 208 192
Flower v. Millaudon, 19 " 185 193
Folsom v. Blake, 3 Edwards R. 442 . . . . . 31, 254
Fonereau v. ———, 3 Wilson R. 59 58
Ford v. Shamburgh, 2 Louisiana R. N. S. 622 191
Foster's case, 11 Coke, 58 133
Foster v. Wood, 6 Johnson's Chan. R. 90 123
Fowler v. Henry, 2 Bailey R. 54 275
Fountain v. Grimes, Croke James, 252 184
Fowler v. Garrett, 3 J. J. Marshall R. 683 . . . . . 92, 184
Fox v. Lipe, 24 Wendell R. 164 . . . . . 49, 241
Fox v. Taliaferri, 4 Munford R. 243 . . . . . 101, 287
Fox et al. Adm'rs v. Whitney Adm'r, 16 Massachusetts R. 118 107, 116, 205
Frederick v. Lookup qui tam, Burrows R. 2018 135
French v. Grindle, 15 Maine R. 163 196
French v. Shotwell, 5 Johnson's Chan. R. 555 231

Fulcher v. Baker, 1 Leigh R. 453 282
Fuller's case, 4 Leonard R. 208 38
Floyer v. Edwards, 1 Cowper R. 112 . . . . . 67, 75, 85
Fulmer v. Hays, 3 McCord's R. 256 273
Fulton Bank v. Beach, 1 Paige R. 429 118
Fussitt v. Brooks, 2 Carrington & Paine R. 318 98

G.

Gaillard v. Seigneur, 1 McMullen R. 225 276
Galloway v. Logan, 4 Louisiana R. N. S. 167 . . . . 49, 191
Gardner v. Morefield, 1 Kebler R. 554 129
Gardner v. Flagg, 8 Massachusetts R. 102 . . . . . 97, 202
George v. Stanley, 4 Taunton R. 553 92
Gibson v. Stearnes, 3 New Hampshire R. 185. . . . 33, 214
Gibson v. Trutoe, 1 Call's R. 54 . . . . . 46, 102, 289
Giddings v. Eastman, 1 Clarke R. 19 84
Gilpin v. Enderly, 5 Barnewall & Alderson R. 154 . . . 37
Givins v. Western Bank of Georgia, 3 Alabama R. 397 . 83, 157
Gibbs v. Chisolm, 2 Nott & McCord's R. 38 271
Glisson v. Newton's Ex'rs, 1 Haywood R. 336 . . . 100, 256
Goff qui tam v. Popplewell, 2 Term R. 707 136
Goodloe v. Ross, 9 Dana R. 593 190
Graham v. Lewin, N. C. Term R. 189 . . . . . 141, 259
Grange's case, 3 Salked R. 391 34
Gray v. Fowler, 1 H. Blackstone R. 462 204
Green v. Kemp, 13 Massachusetts R. 515 . . . . 108, 205
Greenwade v. Greenwade, 3 Dana R. 497 . . . . . 114, 189
Gregory's case, 1 Kebler R. 554 129
Griffith v. Reford, 1 Roll R. 196 116
Grosvenor v. Flax & Hemp Manufacturing Co. 1 Green's Chan. R. 453 220
Grums v. Shrieves, 6 Monroe R. 553 . . . . . 122, 185

H.

Hackley v. Sprague, 10 Wendell R. 113 . . . . . 62, 238
Hale v. Jewell, 1 Greenleaf R. 435 196
Hall v. Haggard & Reynolds, 17 Wendell R. 280 . . . 240
Hamlin v. Fitch, Kirby's R. 260, 1 Root R. 110 . . 81, 163, 235
Hamlin v. Harris, 2 Hening & Munford R. 550 . . . 291
Hammond v. Hopping, 13 Wendell R. 505 . . . 98, 98, 115, 239
Hammett v. Yea, 1 Bosanquet & Puller, 144 58
Hammond v. Alexander, 1 Bibb R. 333 . . . . . 48, 181
Hancock v. Andrews, 1 Porter's R. 9 151
Hance v. Allen, 2 Dallas R. 103 264
Hanson ex parte, Maddock's Chan. R. 112 53
Hargreaves v. Hutchinson, 2 Adolphus & Ellis, 12 . . . 111

Harris v. Boston, 2 Campbell R. 348 51
Harrison v. Hannel, 5 Taunton R. 780 89
Harris qui tam v. Hudson, 4 Epinasse, N. P. C. 152 . . . 131
Harrison v. Bank of Kentucky, 2 J. J. Marshall R. 140 . . . 187
Hart qui tam v. Draper, 2 Marshall R. 358 137
Hartford Bank v. Barry, 17 Massachusetts R. 94 206
Hasbrough v. Baylor, 2 Munford R. 36 286
Harvey v. Crawford, 2 Blackford R. 43 178
Hawk v. Jones, 4 McCord's R. 402 274
Heath v. Evertson, 2 Harrison R. 245 218
Hedgeborrow v. Rosendel, 1 Ventris R. 254 127
Hedges v. Sandon, 2 Term R. 439 113
Hemer v. Harral, 2 Stewart & Porter R. 323 . . . . 48, 155
Herman v. Sprig, 3 Louisiana R. N. S. 190 191
Heytle v. Logan, 1 Marshall R. 529 . . . . . 44, 181
Higgins v. Mervin, Croke James, 508 133
Higginson v. Air, 1 De Saussure R. 427 68
Hills v. Elliott, 12 Massachusetts R. 26 . . . . 109, 204
Hine v. Handy, 1 Johnson's Chan. R. 6 . . . . . 51, 229
Hobart v. Horton, 2 Root R. 47 164
Hogmire v. Chaplin, 1 Harris & Johnson's R. 29 200
Holmes v. Jesse, 5 J. J. Marshall R. 431 187
Holmes v. Wetmore, 5 Cowen R. 149 235
Holden v. Pollard, 4 Pickering R. 173 206
Holton v. Button, 4 Connecticut R. 436 . . . . . 114, 169
Howell's Ex'rs v. Auten, 1 Green's Chan. R. 44 219
Hubly v. Hamilton, 1 Yeates R. 392 264
Hubbel v. Gale, 3 Vermont R. 266 281
Hunt v. Edwards, 4 Harris & Johnson's R. 283 116
Hutchinson v. Henner, 2 Connecticut R. 341, . . . 55, 167, 168
Hutchinson qui tam v. Piper, 4 Taunton R. 810 . . . . 58, 135
Houghton v. Page, 2 New Hampshire R. 42 . . . . 82, 214

I.

Ingram v. Hall, 4 Haywood R. 204 . . . . . 48, 278
Ingham v. Child, 1 Brown's Chan. R. 93 38

J.

Jackson v. Packard, 6 Wendell R. 415 . . . . . 88, 93, 237
Jackson v. Dominick, 14 Johnson's R. 435 . . . . 107, 111, 227
Jackson ex dem. Babbett v. Henry, 10 Johnson's R. 185 . . 111, 225
Jackson v. Smith, 7 Cowen R. 717 236
Jacobs v. Adams, 1 Dallas R. 52 263
Jaffray v. Dennis, 2 W. C. C. R. 253 265
Jennings v. Hankin, 2 Levintz R. 122 131

Johnson v. Johnson, 11 Massachusetts R. 359 . . . 97, 100, 204
Johnson v. Hacker, 1 Dallas R. 407 264
Jones v. Hubbard, 5 Call R. 211 . . . . . 41, 290
Jones v. Hake, 2 Johnson's Cases, 60 . . . . . 59, 91, 225
Jones v. Davidson, Holt's N. P. C. 256 91
Jones v. Brooke, 4 Taunton R. 464 114
Jones v. Watkins, 1 Stewart R. 81 154
Jones v. Whitney, 11 Massachusetts R. 74 204
Jones v. Cannady, 4 Devereau R. 86 259
Jones v. Coolidge, 7 Massachusetts R. 199 116
Jones v. Ringold, 1 Yeates R. 480 264
Jordan v. Lewis, 2 Stewart R. 426 . . . . . 41, 155
Jordaine v. Lashbuck, 7 Term R. 601 115
Joy v. Kent, Hardr. 418 34
Judd v. Secor, 8 Paige R. 548 . . . . . 118, 250

K.

Kains v. Kemp, 4 Louisiana R. 319 192
Kay v. Fowler, 7 Monroe R. 596 186
Kellogg v. Hickok, 1 Wendell R. 521 237
Kent v. Lowen, 1 Campbell R. 178 . . . . . 58, 114
Kent v. Walton, 7 Wendell 256 . . . . . 59, 62, 92, 237
Kent v. Phelps, 2 Day R. 483, 4 Day R. 96 . . . . . 83, 165
Kenn's case, Dyer R. 367 134
Kenner & Co. v. Halliday et al., 19 Louisiana R. 155 193
Kennon v. Dickens, Taylor, 231, Cameron & Norwood, 357 . . 68
Kennor v. Hard, 2 Hening & Munford R. 14 286
Kenry v. Talbot, 4 Bibb R. 39 180
King v. Drury, 2 Levintz, 7 38
Ketchum v. Barker, 4 Hill R. 424 . . . . . 54, 244
King v. Clifton, 5 Term R. 257 137
Kilbourne v. Bradley, 3 Day R. 356 . . . . . 91, 92, 165
King & Jones v. Johnson, 3 McCord's R. 365 . . . . . 101, 273
King v. Allen, 1 Modern R. 69 202
Kinnersly v. Smart, 1 Leonard R. 148, Croke Elizabeth, 195 . . 113
Kirkpatrick v. Houston, 4 Watts & Serjeant R. 115 267
Knight v. Reese, 2 Dallas R. 182 264
Knights v. Putnam, 3 Pickering R. 184 . . . . . 63, 116, 206
Knox v. Good, 25 Wendell R. 643 . . . . . 59, 81, 241
Knox v. Black, 1 Marshall R. 298 181
Knox et al. v. Jones, 2 Dallas R. 193 263

L.

Lamb v. Sizeman, 1 Smith R. 431 263
Lamego v. Gould, Burrows R. 715 37

Lamb v. Lindsey, 4 Watts & Serjeant R. 449 267
Lansing v. McCullum, 1 Cowen R. 35 . . . . 112, 232
Lansing v. Eddy, 1 Johnson's Chan. R. 49, 17 Johnson's R. 436 118, 230
Lane v. Ellzy, 6 Randolph R. 661, 4 Hening & Munford R. 504 114, 289, 292
Lassels v. Chatterton, 1 T. Raymond R. 191 . . . .
Lawless v. Blackey, 4 Monroe R. 488 . . . . . 180, 183
Lawley v. Hooper, 2 Atkins R. 278 38
3 " 379 185
Lawrence v. Saunders, 1 Monroe R. 266 183
Lauderdale v. Gardner, 8 Martin R. 716 191
Lawrence v. Morrison, 1 Yerger R. 444 . . . . 55, 99, 279
Layman v. Strong, 1 Hill R. 563 242
Lear v. Yarnell, 3 Marshall R. 419 . . . . . 114, 182
Lee v. Davis, 1 A. K. Marshall R. 396 31
Lee qui tam v. Cass, 1 Taunton R. 511 . . . . . 58, 134
Lewis's Ex'rs v. Bacon's Ex'rs, 3 Hening & Munford R. 89 . . 69
Lewis v. Latour, 6 Harris & Johnson R. 100 201
Lewis v. Stafford, 4 Bibb R. 319 181
Levy v. Hampton, 1 McCord R. 145 271
Livingston v. Harris, 11 Wendell R. 329 . . . 107, 121, 123, 239
Livingston v. Bird, 1 Root R. 255 164
Lindsey v. Sharp, 7 Monroe R. 248 . . . . . 50, 185
Little v. Rogers, 1 Metcalf R. 108 208
Little v. White, 8 New Hampshire R. 276 215
Lloyd v. Keach, 2 Connecticut R. 175 . . . . . 64, 167
Lloyd v. Scott, 4 Peters R. 205 . . . . . 108, 111, 269
Lloyd qui tam v. Williams, Blackstone's R. 793, 3 Willson 250 . 127, 130
Lollard v. Field, 1 J. J. Marshall R. 284 . . . . 92, 184, 186
Long's Case, 1 Ventris R. 191 137
Long's Ex'rs v. Israel, 9 Leigh R. 556 298
Loveday's Case, 8 Coke R. 130 139
Lowe v. Waller, Douglass R. 735 . . . . . 38, 90
Lowel v. Johnson, 14 Maine R. 240 196
Loze v. Passmore, 5 Serjeant & Rawle, 51 266
Loze v. Walton, Croke Elizabeth, 245 113
Lyle v. Williams, 15 Serjeant & Rawle, 135 . . . . 116, 266
Lyman v. Moore, 1 Pickering R. 295 . . . . . 59, 206
Lyon v. State Bank, 1 Stewart R. 442 . . . . . 115, 154

M.

Mace qui tam v. Lovett, Burrows R. 2833 136
Machin v. Delaval, Barnes 3d ed. 52 88
Macomber v. Dunham, 8 Wendell R. 550 238
Maddock v. Rumball, 8 East R. 304 . . . . . 37, 46
Maddock v. Hammett, 7 Term R. 185 . . . . 58, 128, 136
Maely v. Armstrong, 3 Monroe R. 289 183

Magwood v. Duggan, 1 Hill's R. 182 276
Mallory v. Aspinwall, 2 Day R. 280 . . . . . 105, 165
Mallory v. Bird, Croke Elizabeth, 20 127
Manice v. Dry Dock Company, 3 Edwards R. 146 . . 76
Manners qui tam v. Postan, 3 Bosanquet & Puller, 343 . 133, 137
Manhattan Co. v. Osgood, 15 Johnson's R. 162 . . . 227
Mansfield v. Wheeler, 23 Wendell R. 79 241
Manning v. Wheatland, 10 Massachusetts R. 502 . . . 116
Marsh v. Martindale, 3 Bosanquet & Puller, 150 32, 38, 58, 86, 114, 291
Marvin v. McCullum, 20 Johnson's R. 288 . . . 62, 228
Marvin v. Fester, 8 Wendell R. 533 . . . . . 62, 238
Martin et al. v. Legrand, 2 Little R. 327 . . . . 102, 182
Martin Van Henbeck's case, 2 Leonard R. 38 . . 127, 135
Marshall v. Buckenshaw, 1 New R. 172 133
Marchaud v. Prather et al., 1 Marshall R. 544 181
Marine Bank v. Tisdale, 9 Massachusetts R. 49 203
Marks v. Morris, 2 Munford R. 407 . . . . . 286, 291
Martin v. Lindsey, 1 Leigh R. 499 293
Massa v. Dowling, Strang R. 1243 57
Masterman v. Cowrie, 3 Campbell R. 488 58
Masters qui tam v. Drayton, 2 Term R. 496 138
Mason v. Mason, 12 Louisiana R. 594 . . . . . 115, 193
Mason v. Abdy, Carthew R. 67 34
Matthews v. Lewis, 1 Anstruther R. 7 37
Matthews v. Roberts, 1 Green's Chan. R. 338 . . . 221
Matthews qui tam v. Griffiths et al. { Peake's N. P. C. 200, ... 57
{ 1 Bosanquet & Puller R. 153 58
Maugham qui tam v. Walker, { 5 Term R. 98 137
{ Peake's N. P. C. 163 139
Mayer v. Falkroyd, 3 W. C. C. R. 350 265
Mazuzan v. Mead, 21 Wendell R. 285 . . . . 61, 240
McBrayer v. Roberts, 2 Devereau Equity, 75 . . . 125, 260
McCampbell v. Gill, 4 J. J. Marshall R. 89 187
McClure v. Williams, 7 Vermont R. 210 . . . . . 96, 282
McDaniels v. Barnum, 5 Vermont R. 279 282
McGuire v. Walker Ex'r of Parker, 1 Washington R. 368 . 286
McNairy v. Bell, 1 Yerger R. 502 . . . . . 66, 279
McQueen v. Burns, 1 Hawks R. 476 256
McPherson v. King, 1 Randolph R. 172 288
McGinnes v. Hart, 4 Bibb R. 327 . . . . . 48, 181
Merrill v. Benton, 10 Wendell R. 116 . . . . . 78, 238
Merrill v Law, 9 Cowen R. 65 . . . . . 98, 236
Mestaer v. Hurst, 1 Marshall R. 420 136
Metcalf v. Watkins, 1 Porter's R. 57 . . . . . 115, 156
Michel v. Preston, 5 Day R. 100 . . . . 50, 114, 166, 170
Miami Exporting Co. v. Bank of U. S, 5 Ohio R. 261 . . 262
Middleton v. Hill, Croke Elizabeth, 588 . . . . 102, 112, 122
Miles v. Wister, 5 Binney R. 477 264

Millaudon v. Arnaud, 4 Louisiana R. 319 192
Millers v. McCagg, 4 Hill R. 35 . . . . 115, 244
Miller v. Keen, 1 Bailey R. 24 275
Miller v. Read, 2 Bailey R. 345 275
Mitchell v. Oakley, 7 Paige, 68 . . . . . 61, 250
Moncrure v. Dermott, 13 Peters R. 345 88
Moore v. Hilton, 1 Devereau's Eq. 429 . . . . 40, 67, 257
Moore's Ex'rs. v. Vance, 3 Dana R. 362 . . . 42, 67, 105, 189
Moore v. Battie, Ambler R. 371 46
Moore v. McKay, 2 Malloy R. 137 122
Moore v. Hart, 1 Vernon R. 110 113
Morgan v. Schermerhorn, 1 Paige R. 544 43
Moor v. Southwick, 3 Porter's R. 351 70
Morrell v. Fuller, 7 Johnson's R. 402, 8 Johnson R. 218 143
Morris v. Caldwell, 3 J. J. Marshall R. 694 . . . . 114, 187
Morrison v. Helm, 4 Bibb R. 460 181
Morse v. Hovey, 9 Paige, 197 . . . . . 31, 252, 253
Motte v. Dorrill, 1 McCord R. 350 . . . . . 101, 271
Mowry v. Bishop, 5 Paige R. 98 . . . . . 68, 70
Munn v. Commission Comp., 15 Johnson's R. 44 . . 60, 61, 92, 227
Murden Adm'r v. Clifford, 4 McCord's R. 65 274
Murray v. Cocker, 1 Scammon R. 212 176
Musgrove qui tam v. Gibbs, 1 Dallas R. 216 . . . 266, 286, 289
Myers v. Myers, 2 McCord's Chan. R. 214 68

N

Nasie's case, Noys R. 143 133
Nashville Bank v. Hays & Grundy, 1 Yerger R. 243, 55, 99, 279
Nerot v. Wallace, 3 Term R. 25 113
N. Y. Firemen's Insurance Co. v Donaldson, 3 Edwards R. 199, 57, 254
" v. Ely & Parsons, 2 Cowen R. 678, 32, 58, 232, 234
" v. Sturges, 2 Cowen R. 664, ... 59, 234
Nichols v. Fearson, 7 Peters R. 103 61
Nichols v. Corset, 1 Root R. 294 103
Noland v. Johnson, 1 J. J. Marshall R. 10 182
Norton v. Woods, 5 Paige R. 250 124
Northampton Bank v. Allen, 10 Massachusetts R. 284 . . 49, 204
Norwood v. Waddell, 11 Louisiana R. 493 193
Nott v. Johnson, 2 Vernon R. 27 37
Nott v. Passett, 15 Louisiana R. 306 193
Nourse v. Prime, 7 Johnson's Chan. R. 69 . . . 51, 53, 229, 230
Nevison v. Whitby, Croke Charles, 501. . . . . .

O

Obemyer v. Nichols, 6 Binney R. 162 263
Odell v. Cook, 2 Bailey R. 59 275
Offin v. Price, 5 Yerger R. 285 279

Olcott v. Alden, 6 New Hampshire R. 516 215
Oliver v. Oliver, 2 Rolls R. 468 87
Ossulston v. Yarmouth, 2 Salked R. 449 181
Outen v. Graves, 7 J. J. Marshall R. 630 . . . . 68, 188
Owen Morgan's case, 3 Leonard R. 238 130
Owen qui tam v. Barrow, 1 New R. 101 139
Owings v. Grimes, 5 Little R. 331 183

P

Packard v. Richardson, 17 Massachusetts R. 122 . . . . . 116, 206
Page's case, Lane R. 19 139
Palmer v. Baker, 1 Maule & Selwyn 52
Parr v. Eliason, 1 East R. 92 . . . . . 58, 97
Parker v. Ramsbottom, 3 Barn. & Cress. 257. 5 Dowling & Ryland, 138 97
Paramore v. Robertson, Croke James, 544 135
Parris's case, 1 Ventris R. 49 138
Parker v. Biglow, 14 Pickering R. 436 . . . . . 88, 207
Palmer v. Lord, 6 Johnson Chan. R. 95 . . . . 112, 231
Patterson v. Thompson, 1 Root R. 536 82
Patten v. Thompson, 1 Root R. 526 164
Patterson v. Yorrison, 16 Louisiana R. 557 . . . . 115, 193
Pawling v. Pawling, 4 Yeates R. 220 . . . . . 265, 266
Payne v. Trageant, 2 Bay R. 23 271
Pearsall v. Kingsland, 3 Edwards R. 195 . . . . 61, 107, 253
Penrose v. Hoyt, 1 Dallas R. 378 263
Perkins v. Dye, 3 Dana R. 173 . . . . . 44, 188
Perulleat v. Pench, 2 Louisiana R. 429 192
Phelps et al. v. Riley, 3 Connecticut R. 266 . . . . 82, 114, 168
Phillips v. Cockayne, 3 Campbell R. 119 97
Philadelphia Loan Company v. Turner, 13 Connecticut R. 249 . 97
Phillips qui tam v. Kirkpatrick, Addison R. 125 265
Pierce v. Hedrick, 3 Little R. 113 180
Pierson v. McCouran, 3 Barnewall & Creswell R. 700 . . . 143
Pike v. Ledwell, 5 Espinasse N. P. C. 164 . . . . . 37, 46
Pindall's Exr's v. Bank of Marietta, 10 Leigh R. 481 . . . 70
Planter's Bank v. Snodgrass, 1 Howard's R. 573 211
Portland Bank v. Storer, 7 Massachusetts R. 433 . . . 78, 202
Post v. Boardman, 1 Clark R. 334 124
Post v. Dart, 8 Paige R. 639 . . . . . 107, 250
Postlewait v. Garrett, 3 Monroe R. 347 . . . . . 92, 184
Pollard v. Scoley, Croke Elizabeth, 20 204
Powell v. Waters, 17 Johnson R. 176 . . . . . 62, 116, 227
Powell v. Waters, 8 Cowen R. 669 . . . . . 89, 116, 235
Potkin's case, 8 Leonard R. 63 102
Pratt v. Adams, 7 Paige R. 615 . . . . . 49, 79, 249
Preston v. Jackson, 2 Starkie's R. 237 88
Price v. Campbell, 2 Call's R. 111. 2d ed. 92 . . . . . 78, 290

Q

Queen v. Dy, 11 Modern R. 174 126
Quackenboss v. Leonard, 9 Paige R. 334 252

R

Raines v. Kemp, 4 Louisiana R. 319 49
Ramsbottom v. Parker, 7 Maddock's R. 357 57
Ramsdell & Brown v. Morgan, 16 Wendell R. 574 . 53, 111, 240
Ramsdell v. Soule, 12 Pickering R. 126 88
Ranting qui tam v. Marsh, 8 Term R. 30 136
Rapelje v. Emory, 1 Dallas R. 349 263
Rapelje v. Anderson, 4 Hill R. 472 . . . . . 62, 246
Raplee v. Morgan, 1 Scammon R. 562 176
Rapelje & Purdy v. Prince, 4 Hill R. 119 . . . . . 115, 244
Raphael v. Boehm, 11 Vesey, Jr. R. 93 265
Rayne v. Guthrie, Addison R. 137 265
Read v. Smith, 9 Cowen R. 647 . . . . . 93, 104, 236
Read v. Lansdale, 6 Hardin 179
Reading v. Weston, 7 Connecticut R. 409 170
Reynolds v. Clayton, Moore's R. 397 . . . . . .
Respublica v. Nicholson, 2 Dallas R. 255 264
Respublica v. Steele, 2 Dallas R. 92 266
Rex v. Hendricks, Strang's R. 1234 127
Rex v. Walter, 1 Siderfin R. 421 129
Rex v. Rant, Viner's Abr. Usury, No. 1. 129
Rex v. Garth, 1 Kebler R. 629 133
Rex v. Gillham, 6 Term R. 265 134
Rex v. Upton, Strang R. 816 135
Rex v. Allen, 1 T. Raymond R. 197 202
Rhodes v. Bush, 5 Monroe R. 467 . . . . 114, 182, 183, 184
Rice v. Mather, 3 Wendell R. 62 . . . . . 59, 62, 237
Rice v. Welling et al., 5 Wendell R. 595 . . . . 98, 237
Richards qui tam v. Brown, Cowper R. 770 38
Richardson's Adm'rs v. Brown, 3 Bibb R. 207 . . . . 48, 179
Richardson v. Field, 6 Greenleaf R. 35 195
Ringold v. Ringold, 1 Harris & Gill R. 11 68
Roberts v. Tremayne, Croke James 507 . . . . . 35, 42, 88, 133
Robertson v. Wheeler, 2 Call's R. 421, 2d ed. 354 . . . 50, 290
Roberts v. Gaff, 4 Barnewall & Alderson R. 92 . . . . 111, 178
Robinson v. May, Croke Elizabeth, 588, Goldsborough, 147 . . 122
Rodes v. Blythe, 2 B. Monroe R. 336 71
Rogers v. Rathbun, 1 Johnson's Chan. R. 367 . . . 186, 230
Rose v. Dickson, 7 Johnson's R. 196 . . . . . 44, 47, 225
Ross v. Newell, 3 Munford R. 170 286
Roxster v. Watkins, 3 Porter's R. 436 156
Rubble v. Chaffer et al., 8 Vermont R. 111 283
Ruffin v. Armstrong, 2 Hawks R. 411 . . . . . 63, 256
Ryan v. Blount, Devereau's Equity, 382 69

S.

Saller v. Duman, 7 Monroe R. 382 180
Sancrevein v. Brunner, 1 Harris & Gill R. 477 197
Saunders' case, Shephard's Touchstone, 62 . . . . 50, 185
Savings Bank v. Bates, 8 Connecticut R. 505 170
Seawell v. Scomburger, 2 Murphy R. 200 . . . . 141, 259
Seall qui tam v. Brent, 2 Term R. 238 51
Schefelin v. Stewart, 1 Johnson's Chan. R. 620 69
Scurfield v. Gowland, 6 East. R. 241 113
Scurland v. Houston, 5 Yerger R. 310 278
Scott v. Lloyd, 9 Peters R. 418 39
Scott v. Lewis, 2 Connecticut R. 132 . . . . 91, 105, 169
Scott v. Nichols, 4 Day R. 318 98
Scott qui tam v. Brest, 2 Term R. 238 131
Scurvy qui tam v. Freeman, 3 Bosanquet & Puller R. 381 . 128, 130
Shackelford v. Morris, 1 J. J. Marshall R. 497 187
Shaller v. Brand, 6 Binney R. 435 263
Shanks v. Kennedy, 1 Marshall R. 65 . . . . . 44, 181
Shank qui tam v. Payne, Strang R. 633 137
Sharpley v. Hurrell, Croke James, 208 34
Sheldon v. Steeve, 5 Connecticut R. 181 170
Shoemaker v. Kurcliff, 1 Dallas R. 127 266
Shufelt v. Shufelt, 9 Paige R. 137 . . . . . 106, 252
Sibby v. Morgan, 3 Leigh R. 577 . . . . . 43, 293
Sims v. Willing, 8 Sergeant & Rawle, 103 265
Simpson qui tam v. Warren, 15 Massachusetts R. 460 . . 205
Sizer v. Miller et al., 1 Hill R. 227 . . . . . 80, 242
Simmons v. Cockerhill, Noy R. 151 . . . . 34, 38, 133
Seymour et al. v. Strong, 4 Hill R. 255 . . . . . 45, 245
Skinner v. Miller, 5 Little R. 88 180
Skipwith v. Gibson & Jefferson, 4 Hening & Munford, 490 . . 291
Sloan v. Lomas, 2 Green's R. 510 217
Smith v. Nichols, 8 Leigh R. 830 . . . . 37, 47, 115, 297
Smedley qui tam v. Roberts, 2 Campbell's R. 607 . . . 46
Smith's Adm'rs v. Payne, Rice's Digest, 37 . . . . 65, 275
Smith qui tam v. Prayer, 2 Espenasse N. P. C. 486 . . . 138
Smith v. Beach, 3 Day R. 286 165
Smith v. Brush, 8 Johnson's R. 84 226
Smith v. Broomley, Douglass R. 696 113
Solarte v. Melville, 7 Barnewall & Creswell R. 430 . . . 32, 38
Solomons & Co. v. Jones & J., 1 Term Conference R. 144 . 65, 271
Spark v. Long, 1 Iredell's Equity, 426 70
Spaulding v. Austen, 2 Vermont R. 555 . . . . . 104, 281
Spencer v. Tilden, 5 Cowen R. 144 . . . . . 37, 235
Spangler v. Snapp, 5 Leigh R. 478 295
Sparks v. G——, 1 Binney R. 165 264

Stackell v. Etheall, 3 Gill & Johnson R. 123 . . . . 34, 94, 198
Spurrier v. Mayos, 4 Brown's Chan. R. 28 85
Stafford v. Rice, 5 Cowen R. 23 116
Staley v. Kneeland, 1 Clarke's R. 30 255
Stanton v. Barton, 2 Bulstrode R. 34 130
Stasop v. Phelps, 7 Dana's R. 300 190
State Bank v. Knox, 1 Devereau & Batile Eq. 50 . . 125, 260
State Bank of North Carolina v. Cowen, 8 Leigh R. 238 . 36, 297
State Bank v. Hunter, 1 Devereau's R. 100 . . . 60, 257
Stebbins v. Smith, 4 Pickering R. 97 . . . . . 95, 207
Steele v. Whipple, 21 Wendell R. 103 . . . . 53, 240
Steele qui tam v. Sowerby, 6 Term R. 171 136
Steptoe v. Harvey, 7 Leigh R. 501 . . . . . 36, 296
Stevens v. Davis, 3 Metcalf R. 211 . . . . . 50, 208
Stewart v. Mechanics' Bank, 19 Johnson's R. 496 . . 44, 229
Stewart v. Fowler, Harper's R. 403 . . . . . 140, 276
Stewart v. Downer, 8 Vermont R. 320 . . . . 42, 283
Stewart v. Eden, 2 Caine's R. 150 225
Stone v. Jones, 4 McCord's R. 254 274
Storer v. Logan, 9 Massachusetts R. 55 32
Stoughton v. Lynch, 2 Johnson's Chan. R. 209 . . . 69, 228
Stratton v. Lyman, 2 Moore R. 125 71
Streton v. Taylor, Croke Elizabeth, 133 . . . . 137, 139
Simpson qui tam v. Warren, 15 Massachusetts R. 460 . . 140
Stribbling v. Bank of the Valley, 5 Randolph R. 132 . . 43, 289
Suffolk Bank v. Kidder, 12 Vermont R. 464 284
Summers v. Williams, 1 Metcalf R. 398 208
Surlott v. Pratt, 3 Marshall R. 174 . . . . . 114, 181
Sussex Bank v. Baldwin, 2 Harrison R. 496 218
Suydam v. Westfall, 4 Hill R. 211 . . . . . 54, 244
Swartwout v. Payne, 19 Johnson's R. 294 . . . . 97, 98, 228

T.

Tait's Ex'rs v. Hannum, 2 Yerger R. 350 63
Talbot v. Warfield, 3 J. J. Marshall R. 84 187
Talford v. Summer's Ex'rs, 2 Yerger R. 255 279
Tappan v. Prescott, 9 New Hampshire R. 531 215
Tardeveau v. Smith, Hardin R. 175 . . . . . 40, 180
Tate v. Wellings, 3 Term R. 531 . . . . . 37, 46, 85, 97
Tailleur qui tam v. Cox, 6 Term R. 173 136
Taylor v. Mick, 4 Blackford R. 388 178
Taylor v. Smith, 2 Hawks R. 465 260
Teagen v. Russell & Moore, 2 Stewart R. 420 155
Thatcher v. Garman, 12 Massachusetts R. 268 204
Thomas v. Fish, 9 Paige R. 478 251
Thomas v. Cotheall, 5 Gill & Johnson's R. 23 198

Thompson v. Jones, 1 Stewart R. 556 . . . . 41, 155
Thompson's Ex'rs v. Thompson, 8 Massachusetts R. 135 . 100, 202
Thompson v. Berry, 3 Johnson's Chan. R. 395 . . 118, 228, 230
Thompson v. Moses, 7 Massachusetts R. 361 . . . 140, 202
Thornhill v. Evans, 2 Atkin's R. 330 181
Thorp v. Ruks, 1 Devereau & Battle Eq. 613 . . . 50, 258
Toole v. Stephen, 4 Leigh R. 581 . . . . . 56, 293
Topcliff qui tam v. Waller, Dyer R. 346 . . . . 130, 135
Toppin v. Van Pelt, Hoffman's R. 525 124
Townsend v. Bush, 1 Connecticut R. 260 . . . . 114, 167
Tullett v. Linfield, Burrows R. 1455 135
Tupper v. Powell, 2 Johnson's Chan. R. 439 . . . 230
Trotter v. Curtiss, 19 Johnson's R. 160 . . . 52, 226
Tregming v. Attenborough, 7 Bingham R. 97 . . . 111
Treday v. Harndern, Jacob R. 144 37
Trumboo Ex'r of Niff v. Blizyard & Jacob, 6 Gill & John. R. 18 108, 199
Train v. Collins, 2 Pickering R. 145 . . . . . 43, 207
Trump v. Nicholas, 6 Leigh R. 251 294
Turner v. Calvert, 12 Sergeant & Rawle, 46 . . . 266
Turpin v. Turpin, 7 J. J. Marshall R. 37 188
Turpin v. Povall, 8 Leigh R. 93 . . . . . 84, 298
Tuthill v. Davis, 20 Johnson's R. 285 . . . . . 93, 116, 228
Tuttle & Holt v. Clarke, 4 Connecticut R. 153 . . 41, 64, 169
Tyson v. Richards, 3 Harris & Johnson, 112 . . . 50, 200

U.

Utica Insurance Company v. Caldwell, 3 Wendell R. 296 . 57, 254
" " " v. Tillman, 1 Wendell R. 555 . 59, 237
" " " v. Bloodgood, 4 Wendell R. 652 . 237

V.

Van Benschoten v. Lawson, 6 Johnson's Chan. R. 313 . 68, 69, 265
Van Schaick v. Edwards, 2 Johnson's Cases, 355 . . 21, 71, 225
Van Schaick v. Stafford, 12 Pickering R. 565 . . . 116
Varick's Ex'rs v. Crane, MS. Case 221
Vaux v. Austen, Lane R. 59 139
Vermilyea v. Ryers, 4 Hill R. 567 246
Villars v. Carey, 6 Modern R. 303 . . . . 112, 114, 289
Vroom v. Ditmas, 4 Paige R. 526 . . . . . 107, 118

W.

Wade qui tam v. Wilson, 1 East R. 195 . . . . 128, 133
Wadsworth, Whitman, & Chaplin v. Champion, 1 Root R. 367 40, 82, 164
Wales v. Webb, 5 Connecticut R. 154 . . . . 88, 95, 169
Wardell v. Eden, 2 Johnson's Cases, 268, 1 Johnson's R. 531 . 225

Warfield v. Boswell, 3 Dana R. 225 188
Warren v. Crabtree, 1 Greenleaf R. 167 . . . . . 88, 94, 195
Walton v. Shelly, 1 Term R. 296 . . . . . 115, 218
Watkins v. Taylor, 2 Munford R. 424 286
Watkins v. Watkinson & Co., 2 Stewart R. 485 155
Watson v. Geyland, 1 Root R. 137 164
Watkinson v. Root, 4 Ohio R. 373 262
Webb v. Warfield, Bridg. 112 139
West v. Belcher, 5 Munford, 187 288
Wharton v. May, 5 Vesey, Jr. R. 27 37
Wheaton v. Hibbard, 20 Johnson's R. 290 143
Wheaton v. Tisdale, 9 Massachusetts R. 326 203
Whelpdale's case, 5 Coke R. 119 107
Whinton qui tam v. Marine, Dyer R. 95 127
Whipple v. Powers, 6 Vermont R. 457 . . . . . 88, 283
Whitmarth v. Young, 5 Randolph R. 333 . . . . . 65, 289
Wholly v. Crutezner, 6 Monroe R. 158 . . . . . 50, 184
Wicks v. Gogerly, Ryan & Moody, 123, 1 Carrington & Paine, 396 . 88
Wiley v. Yal, 1 Metcalf R. 553 208
Willard v. Ruder, 2 McCord's R. 369 272
Williams v. Craig, 1 Dallas R. 315 263
Widgery v. Monroe, 6 Massachusetts R. 449 116
Williams v. Hance, 7 Paige R. 581 . . . . . 99, 247
Wilkie v. Roosevelt, 3 Johnson's Chan. R. 66, 206 . 59, 91, 93, 225
Wilkes v. Brumer, 2 McCord's R. 178 . . . . . 65, 272
Willoughby v. Comstock, 3 Edward's R. 424 . . . 43, 80, 254
Wilson v. Walker, 3 Stewart R. 211 . . . . . 83, 155
Wilmot v. Munner, 4 Day R. 114 . . . . . 140, 166
Wilkes v. Coffee, 3 Hawks R. 28 . . . . . 140, 257
Wilson v. Kilburn, 1 J. J. Marshall R. 596 186
Willer v. Green, 2 New Hampshire R. 333 214
Williams' Ex'rs v. Williams, 3 Green R. 255 218
Witherhead v. Boyers, 7 Yerger R. 545 . . . . . 115, 280
Wood v. Greenwood, 10 Barnewall & Creswell R. 689 . . 143
Woody's case, Croke James, 104 133
Woodward v. Fitzpatrick, 9 Dana R. 121 . . . . . 48, 190
Woodruff v. Williams, 1 Marshall R. 419 136
Wright v. Wheeler, 1 Campbell R. 165 . . . . . 51, 92
Wright v. Wright, 2 McCord's Chan. R. 202 70
Wright v. McGibbony, 2 Devereau & Battle Eq. 474 . . 141, 259
Wright v. Laing, 3 Barnewall & Creswell R. 165 . . . 142
Wright v. Elliott, 1 Stewart R. 391 154
Wright v. Martin, 2 Stewart R. 453 155

Y

Yordon V. Hess, 13 Johnson R. 492 . . . . . 104, 227
Young v. Berkeley, 2 New Hampshire R. 410 214
Young v. Scott, 4 Randolph R. 415 288

THE HISTORY OF USURY.

Usury is money given for the use of money for any certain time, and is called (at this day) the interest thereof; the lending or letting out money at interest or upon usury, before *stat.* 37, *Hen.* 8, *c.* 9, was against the canon law, the common law, and the statute of this realm; it was forbidden by the laws of King Alfred. *Horn's Mirror, cap.* 1. *sect.* 3. *Si quis de usura convictus fuerit, omnes res suas amittat. Custumier de Normandy, cap.* 20. *Inter leges sancti Edwardi.* If any one after his death had been found an usurer, all his goods and chattels were forfeited to the king. *Usurarii omnes res, sive testatus sive intestatus decesserit, domini regis sunt. Glanvil, lib.* 7, *cap.* 16.

By the statute of Merton, cap. 5, anno 1235, it was granted by the king, that from henceforth usuries shall not run against any being within age. Lord Coke, in 2 Inst. 89, says, this statute is expounded to extend to the usurious *Jews* that were then in England; for at that time, and before the conquest also, it was not lawful for Christians to take any usury; and by this act it is manifest that the usury *intended* by the statute was not unlawful; for the usury due before the death of the ancestor is enacted to be paid, and after the full age of the heir also, and no usury was permitted but by the Jews only.

But by the statute of Judaismo 18 Ed. 1, anno 1290, it is ordained and establishe, that no Jew from thenceforth should take any usury, 2 Inst. 89—506.

And by many authorities and records, it appears that usury was unlawful and punishable in all the reigns until the statute, 37 *Hen.* 8, c. 9, which seems wonderful, as it appears, that between the fiftieth year of *Henry III.*, and the second of Edward I., which was not above seven years complete, there was paid into the king's coffers four

hundred and twenty thousand pounds of and for the usury of the *Jews.* 3 *Inst.* 151.

It appears by the history of Charles V., that in the year 1490 money was borrowed at £40 *per cent.*, in 1511 at £20 *per cent.*, and in 1530 usury was fixed, per Charles V. at £12 *per cent.* *Robertson's History of Spain.*

By the statute of 37 *Hen.* 8, ch. 9, *anno* 1546, no person, by way of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares, or other things, or by any other deceitful way, shall take in gains for the forbearing of one year, for *his money or other* thing that shall be due for the same wares or other things, above £10 in the £100, upon pain of forfeiting treble value of the wares or other things sold, imprisonment, fine and ransom, at the king's pleasure.

There is no mention in this statute of the loan of money; the offence intended to be punished, seems to be the *taking in gains for the forbearing of one year for his money or other thing that shall be due for the same wares or other things above £10 in the £100*; it is not said *for money lent*, or the use or interest of *money lent*, so that it seems as if it was then still penal to take any interest (even £5 *per cent.* for the *loan* of *money.*

But by the *statute* of 13 Eliz. c. 8, anno 1570, sect. 3, all bonds, &c., made for payment of any principal or *money* to be lent, or covenant to be performed upon or for any usury in lending or doing of any thing against the statute of 37 Hen. 8, c. 9, upon or by which loan or doing there shall be reserved or taken above the rate of £10 for the £100 for one year, shall be utterly void.

By the 21 James 1, c. 17, anno. 1623, no person shall take for loan of monies, &c., above eight for a hundred, for one year.

By 12 Charles 2, ch. 13, anno 1660, no person shall take for loan of monies, &c., above £6 for the forbearance of £100 for a year. And by the 12 Anne, c. 16, anno 1713, entitled an act to reduce the rate of interest, &c., 1st. No person upon any contract shall take for loan of any monies, &c., above the value of £5 for the forbearance of £100 for a year. 2d. All bonds and assurances for payment of any money to be lent upon usury, whereupon there shall be reserved or taken above five in the hundred, shall be void. 3d. Every person who shall receive by means of any corrupt bargain, loan, exchange, chevisance, shift or interest, of any wares, or other thing, or by any deceitful way for the forbearing or giving day of payment for one year, for their money or other thing, above £5 for £100 for a year, shall forfeit the treble value of the *monies* and other things lent.

Chancellor Kent, in 1819, says, If we look back upon history, we shall find that there is scarcely any people, ancient or modern, that have not had usury laws. I believe there is not a nation in *Europe* at this day without them. In ancient *Rome*, according to *Tacitus*, (*Ann.* lib. 6, ch. 16,) usury was discouraged in the early period of the Republic, by the Twelve Tables, which reduced interest to one per cent. It was afterwards lowered to one half per cent., and finally abolished by the clamours of the people. It was revived in the ages of commerce and luxury, but placed under necessary restrictions. Four or six per cent. was the ordinary interest; eight per cent. was allowed for the convenience of commerce, and twelve per cent. might be taken for maritime hazards, by the laws of *Justinian*, but the practice of more exorbitant interest was severely restrained.

The *Romans*, through the greater part of their history, had the deepest abhorrence of usury. They did not derive their objection to usury from the prohibitions in the *Mosaic* law, nor did they hold it sinful, as the learned Fathers of the early and middle ages of the church have done, for they knew nothing of that law. The *Roman* lawgivers and jurists acted from views of public policy. They found, by their own experience, that unlimited usury led to unlimited oppression, and that the extortion of the creditor, and the resistance of the debtor, were constantly agitating and disturbing the public peace.

But it is not only the civilized and commercial nations of modern *Europe*, and the sage lawgivers of ancient *Rome*, that have regulated the interest of money. It will be deemed a little singular, that the same voice against usury should have been raised in the laws of *China*, in the *Hindu* Institutes of *Menu*, in the Koran of *Mahomet*, and, perhaps we may say, in the laws of all nations that we know of, whether *Greek* or *barbarian*.

There is one exception, however, that I ought to notice, and which is supposed to be found in the laws of *Solon*, given to the *Athenian* Republic. This celebrated lawgiver is said to have allowed parties to regulate the rate of interest by their own contracts. When *Solon* was called to make laws for *Athens*, the state was in complete anarchy; and when he was asked if he had provided the best of laws for the *Athenians*, he replied, that he had provided the best that their prejudices would admit of. One of his first steps was, to cancel all existing debts, though, according to *Plutarch*, (Life of *Solon*,) it is not certain that he proceeded to this violent measure; for many said that he did not cancel debts, but only moderated the interest. And the result of this law allowing interest to regulate itself, I shall give in the

words of *De Pauw*, (*Recherches Philosophique sur les Grecs*, 5 sect. § 2.) He says, that usage fixed the rate of interest at 12 per cent. in certain cases, and at 18 per cent. in others, and that "the *Athenians* regarded all those who did not conform to this usage as usurers, that is, as the most vile and the most ignominious of mankind. The public voice, which cried against them, and the profound contempt to which they were condemned, formed a punishment so great, that the lawgiver did not deem it necessary to add any other punishment." The usage in this case formed the law.

Now, according to this view of the fact, interest was limited at *Athens*, as effectually and as precisely, by this customary law, as it would have been by any penal statute; and the *Athenian* commonwealth is not to be cited as a real exception to the general practice of mankind.

The principal error which has prevailed on this subject, is the condemnation of any kind of interest, however small. A host of great names, from *Aristotle* among the *Greeks*, to the modern civilians, such as *Domat* and *Pothiér*, might be cited, who rank all interest of money under the name of usury, and condemn it. But the sense of mutual benefit has, on this point, resisted, with equal firmness, the decrees of the church and the speculations of philosophers, and a regulated and reasonable interest has had the sanction, not only of our own municipal law, but of the most cultivated and enlightened human reason. *Grotius*, (lib. 2, c. 12. § 20, 22,) after discussing the question, whether usury may be permitted by the natural and divine law, concludes, that a reasonable interest may be permitted; and he cites *Holland* as an instance, in which eight per cent. is the ordinary, and twelve per cent. the mercantile interest. But he insists, that interest cannot be rightfully permitted beyond a reasonable limit: *Non mordaces sed modice*, according to *Heineccius*, in his commentary on this passage, and who admits that it belongs to the discretion of the lawgiver to regulate the *quantum* of interest. He says further, that in *Germany*, by imperial ordinances in 1600 and 1654, interest at the rate of five per cent. was allowed, though the canons of the church everywhere condemned it, and higher interest is now permitted. (*Heinec. Elem. Jur. Germ. Lib.* 2. *tit.* 13. § 378. *Elem. Jur. civ. secund. Ord. Pand. part* 4. *lib.* 22. *tit.* 1. § 104. *Prolec in Grot. ubi sup.*) *Puffendorf* (*Le Droit de la nat. et des gens. lib.* 5, *ch.* 7,) examines the subject at great length, and with great learning, and concludes with his approbation of those civil laws which allow and regulate interest, but do not permit individuals to take just what their cupidity would demand. Lord *Bacon*, in one

of his moral essays, (No. 41,) has also discussed the question, and examined the arguments for and against interest with his usual sagacity, and he concludes, that two things are to be reconciled: "The one," to use his own words, "that the tooth of usury be grinded, that it bite not too much; the other, that there be left open a means to invite moneyed men to lend for the continuing and quickening of trade;" and he recommends a general rate of interest, say five per cent. for ordinary cases, and a higher rate of interest in matters of trade.

Can we suppose, that a principle of moral restraint of such uniform and universal adoption, has no good sense in it? Is it altogether the result of monkish prejudice? Ought we not rather to conclude, that the provision is adapted to the necessities and the wants of our species, and grows out of the natural infirmity of man, and the temptation to abuse inherent in pecuniary loans? The question of interest arises constantly, and intrudes itself into almost every transaction. It stimulates the cupidity for gain, and sensibly affects the heart, and gradually presses upon the relation of debtor and creditor. Civil government is continually placing guards over the weaknesses, and checks upon the passions of men, and many cases might be mentioned, in which there is, equally with usury laws, an interference of the lawgiver, with the natural liberty of mankind to deal as they please with each other. But no person doubts of the necessity and salutary efficacy of such checks. On the same principle, that unlimited usury may be permitted, the law ought to allow the creditor to insert in his bond a provision for compound interest, whenever the stipulated interest becomes due and is not paid. Nay, parties ought to be allowed to agree, that if the condition of a bond be not performed at the day, the penalty shall not only be nominally forfeited, but literally exacted. I should apprehend, that if these things were to be permitted, there would not be strength enough in the government to support the administration of justice. It is an idle dream to suppose that we are wiser and better than the rest of mankind. Such doctrine may be taught by those who find it convenient to flatter popular prejudice; but the records of our courts are daily teaching us a lesson of more humility. And, I apprehend, it would be perilous in the extreme, to throw aside all the existing checks upon usurious extortion, and abolish or traduce a law which is founded on the accumulated experience of every age.

The *Roman* commonwealth, if we may place reliance upon its earlier history, tried every experiment on this interesting subject. The *Romans* had no law regulating the interest of money, and left the par-

ties to their own contracts, till the law of the twelve tables, according to *Tacitus*, or the law of the tribunes, in the year of Rome 398, according to *Montesquieu*. The consequence was, unceasing quarrels between the patricians and plebeians, and popular secessions to the *mons sacer*, in which one party pleaded the obligation, and the other the severity of their contracts. Interest was then reduced to the smallest allowance, and finally abolished, which led to a still more frightful usury, until, at last, the emperors were obliged to allow, but regulate and limit, the charge of usury. So true it is, according to the President *Montesquieu*, (*Esprit des Loix*, liv. 22, ch. 21, 22,) who has discussed this subject at large, that extreme laws produce extreme evil, *les loix extrêmes dans le bien font naitre le mal extrême*. The *Romans*, at one time, had no laws against usury; and, at another time, they allowed no interest; and these are the extreme laws which this celebrated civilian condemns. *Dunham* v. *Gould*, 16 *Johnson R.*, 376, *et seq.*

The true reason on which the legislature has said, that in bargains for money no more than a certain fixed sum shall be taken by way of interest for the loan, is founded on just principles of public policy. First of all, it is more advantageous to the public that persons who are in possession of money, should use their own industry in the employment of their money, than that they should sit idle and take the benefit of it, through the industry of others; and therefore the loan of money at any large rate of interest, has always been discouraged; and as a state becomes rich, the interest of money is always diminished, with the view that the men who sit idle shall receive as low a rate of interest as can induce them to lend to another. But if a consideration of any description beyond that rate of interest can be had, the profit derived from that is just as injurious to the public as if it were taken in the shape of a reservation of a higher interest. And therefore the policy of the law would be completely defeated, if courts were not to be jealous of such transactions as these, and were not to watch them with severity, and to be sure that they did not permit persons, under cover of ordinary dealings between man and man, to obtain an advantage beyond the legal interest. If every man could obtain for the loan of his money as high a rate of interest, without hazard, as they do who employ it in trade and manufactures, which are hazardous undertakings, the most industrious of the people would be ground down by usurers; they would get the profits of trade; and the enterprising and industrious trader would be ruined. One sees every day, where traders who have been in the habit of borrowing become bankrupts, how

large a share of their property is swallowed up by usurers. *Lord Redesdale.* 1 *Scho. and Lef.* 195–312.

By 3 and 4 of Will. 4, c. 98, s. 7, bills and promissory notes made payable at or within three months after the date thereof, or not having more than three months to run, are exempted from the operation of the usury laws. And by the 7 William 4th, and 1 Vict. c. 80, this exemption was extended to bills and notes payable at or within twelve months, or not having more than twelve months to run. And now, by the statute 2 and 3 Vict. c. 37, entitled "An act to amend and extend until the first day of January, 1842, the provisions of an act of the first year of her present Majesty, for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury," it is enacted, that from and after the passage of this act, (i. e. 29th July, A. D. 1839,) no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money *above the sum of £10 sterling*, shall, by reason of any interest taken thereon, or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any *such* bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, endorsing, or signing any such bill or note, or lending, or advancing, or forbearing any money, as aforesaid, or taking more than the present rate of legal interest in Great Britain and Ireland respectively, for the loan or forbearance of money, as aforesaid, be subject to any penalty or forfeiture, any thing in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom to the contrary notwithstanding. Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any *lands, tenements*, or *hereditaments*, or any estate or interest therein."

Sec. 2 provides and enacts, "That nothing in this act contained, shall be construed to enable any person or persons to claim in any court of law or equity more than £5 per cent. interest on any amount, or on any contract or engagement, notwithstanding they may be relieved from the penalties against usury, unless it shall appear to the court that any different rate of interest was agreed to between the parties."

SEC. 3 provides, "That nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers; but that all laws touching or concerning pawnbrokers shall remain in full force and effect to all intents and purposes whatsoever, as if this act had not been passed."

It would seem that several of the United States have had in view the above acts of Great Britain, in the recent modification of their usury laws.

"By a law of the Colony of Massachusetts, 1641, it is ordered, decreed, and by this court declared; that no man shall be adjudged for the mere forbearance of any debt above eight pounds in the hundred, for one year, and not above that rate proportionably for all sums whatsoever, bills of exchange excepted; neither shall this be a colour or countenance to allow any usury amongst us contrary to the law of God." This appears to have been the law in relation to interest until 1693, when interest was reduced to six per cent., and all contracts reserving more were declared utterly void, and a penalty for receiving more to the full value of the goods, monies, or other things so received, one moiety to the government and the other to the informer that shall sue for the same; with a saving of maritime contracts as before accustomed. This act was in substance re-enacted in 1783, with an additional section directing the mode of proof; which act, with a slight variation in 1788, appears to have continued until the late act now in force. Under this act of 1783, the principal decisions were made, referred to in this work. The present act now in force in Massachusetts was first passed in 1825, and continued through the late revision of the statutes.

The laws of Connecticut, published in 1715, contain in substance the present act now in force, with the exception of the third section, directing the mode of proof.

The laws of Vermont, of October, 1797, fixed the rate of interest in Vermont at six per cent., and added a forfeiture of all over that and twenty-five per cent. in addition, one moiety to the state and the other to the prosecutor. This act continued until 1822.

The present act against usury in New Hampshire was passed in 1791.

The first act of the colonial legislature of New-York against usury, appears to have been that of the third year of King George the First, (Sept. 27, 1717,) which reduced interest to six per cent., and was very similar to the British statute of Queen Anne. This act appears to have been intended as an experiment, as it was to continue only five

years from its publication. It was, however, repealed in 1718, so far as to increase the rate of interest to eight per cent., with the like forfeitures of the former act for taking more. *For these acts, see Bradford's Laws of the Colony.* The latter act continued until 16th Dec., 1737, when interest was reduced to seven per cent.; which last act has been substantially continued through the act of 1783, and subsequent revisions of the statutes, with slight alterations, until 1830. The act of 1737, went into operation 1st May, 1738.

Under the British statute 12 Anne, bills or notes founded on an usurious consideration were void, even in the hands of a *bona fide* holder. *Lowe* v. *Waller, Doug.* 736—1 *Starkie* 385—2 *B. and Ald.* 590—8 *Price* 228. But by the statute of 58 George 3, c. 93, reciting that to be the law, and that in the course of mercantile transactions negotiable securities often passed into the hands of persons who had discounted the same without any knowledge of the original consideration for which the same were given, and that the avoidance of such securities in the hands of such *bona fide* endorsers, without notice, was attended with great hardship and injustice, it was enacted that "no bill of exchange or promissory note shall, though it may have been given for an usurious consideration, or upon a usurious contract, be void in the hands of an endorser for *valuable consideration*, unless such endorser had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury."

The operation of this latter statute was, that if, in an action on a bill or note, the defendant succeeded in establishing that it was founded on an usurious contract or consideration, the plaintiff was bound to prove that he gave value for it, and then the defendant must have shown that the plaintiff nevertheless had notice of the usury at the time he took the security. *Wyatt* vs. *Campbell, Moody and Maulkin*, 80.

This act, however, though evidently intended to repeal so much of the 12 Ann 2, 16, as rendered bills and notes given for an usurious consideration void in the hands of a *bona fide* indorser for valuable consideration, who had no notice of the usury, but not having in fact repealed any of the provisions of that statute, was held to be confined to parties who had *discounted* or paid a valuable consideration for the bill or note, and not to extend to a party who had taken it in payment of an antecedent debt.—6 *Add. and Ellis* 932. 2 *N. & P.* 78.

Adopting this principle, and perhaps in consequence of the decision of the Court for the Correction of Errors in the case of *Powell* v.

Waters, the Revised Statutes of New York established as follows: Sec. 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved, or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods, or other things in action, than is above prescribed, shall be void; *but this section shall not extend to any bills of exchange or promissory notes, payable to order or bearer, in the hands of an indorser or holder, who shall have received the same in good faith, and for valuable consideration, and who had not, at the time of discounting said bill or note, or paying such consideration for the same, actual notice that such bill or note had been originally given for a usurious consideration, or upon a usurious contract.*

This last reservation of the 5th section of the R. S. relating to interest had the effect of throwing the doors wide open to the usurers, and in the years 1834–5–6 there was scarcely any practical restraint upon them. Usury stalked abroad at noonday, and any attempt to describe the disastrous effects of that section would be little short of the history of the times. It could not be written without the pen of a Gibbon. The interior of the state, however, in May 1837, succeeded in rescuing the City of New York from the usurers by their majority in the Legislature, and passed the act now in force, which took effect in the following July. Repeated attempts have been subsequently made by demagogues to effect a repeal, but the countrymen have as yet remained firm.

The first act against usury in New Jersey was passed at Perth Amboy, 1738, in the twelfth year of King George the Second, which fixed the rate of interest at seven per cent., and all contracts reserving more were declared utterly void, with a penalty of all received on such contract. This act appears to have been continued, in substance, to the present day, except the reduction to six per cent., which took place in 1823.

On the 27th Nov. 1700, interest was reduced from eight to six per cent. by the act of William Penn, Esq., Proprietary and Governor in Chief of Pennsylvania and Territories, and a forfeiture of the thing so lent, upon conviction of receiving more. This act was repealed 7th Feb. 1705, and re-enacted 2nd March 1723, by William Keith, Governor of Newcastle, Pennsylvania and Territories. This act has been continued in both states until the present day.

The original act against usury in Maryland, has continued, without

variation, from its passage in September, 1704, to the present day.

The rate of interest in Virginia in 1730, was fixed at six per cent. per annum; in 1734 it was reduced to five per cent., and the former act amended by giving costs to the prosecutor, and authority to the borrower to exhibit a bill in equity against the lender to discover the usury. In the revisal of 1748, the provisions of the act of 1734 were re-enacted —1748 *edition* 1752, *chap.* 37, *and ed.* 1769, *chap.* 30. The same rate of interest is prescribed in the act of 1786, and it continued at five per cent. until the 1st of May 1797, when the act of 1796 took effect, (*ed.* 1803 *and* 1814 *c.* 209,) by which it was raised to six per cent.

The original act against usury in North Carolina, which was passed 1741, continues in force in that state through subsequent enactments, and was in force in Tennessee, until the act of that state, passed 1819, which made usury indictable—which continued until the present act in that state passed in 1835, which is now in force.

In South Carolina two laws were passed, one in 1720, the other in 1721, against usury; the last of which brings indirectly into view the rate of interest. This prohibits the taking of more interest for money lent than ten per cent. per annum, under a forfeiture of treble the amount: in 1748, a law passed for reducing interest from ten to eight per cent., and in 1777 it was reduced from eight to seven per cent. With the last laws for reducing interest, severe penalties against usury were incorporated *See Ramsay's History, vol.* 2, *p.* 197. At the present time the legal interest is seven per cent., as it has been since 1777. The bank interest is six per cent.

Georgia passed an act against usury 27th March, 1759, similar in its provisions to the statute of Queen Anne, but allowing interest at eight per cent. per annum. *For this see Prince's Laws of Georgia.* It continued in force until its repeal by the passage of the present act, 1822.

Alabama, by the act of 1805 allowed interest at six per cent. per annum, and declared the contract void for the excess. Afterwards, by the act of 1818, any rate of interest or premium for the loan oruse of money, wares, merchandise or other commodity, fairly and bona fide stipulated and agreed upon by the parties to such contract, expressed in writing, and signed by the party to be charged therewith, was legal and recoverable, and no *bona fide* contract was to be varied or in any manner impeached by reason of any premium or rate of interest so stipulated and expressed. This law was repealed the next year, 1819, by the act now in force, to which a supplement was added in 1834.

The territorial legislature of Ohio, passed an act on the 14th of July, 1795, declaring in force the eighth chapter of the statute of the parliament of Great Britain, held in the thirteenth year of the reign of Queen Elizabeth, and the ninth chapter of the statute of the parliament of Great Britain, held in the thirty-seventh year of the reign of King Henry the Eighth. Another act was passed November 15th, 1799, repealing the former act, and fixing the rate of interest at six per cent., with a forfeiture of all over principal lent, in case of receiving more. *Chase, Laws of Ohio, vol.* 1, *page* 218.

The state of Ohio passed an act to prevent usury, which forfeited the excess over principal only, December 29, 1804, which continued until its repeal by the passage of the present act, January 12, 1824.

The first act against usury in Kentucky was passed 1798, which was similar in its provisions to the act then in force in Virginia. This continued until its repeal by the passage of the present act, 1819.

Such being the laws against usury in the different states, and materially variant in many particulars, both as to the effect of the contract, and the mode of proceeding under them; the constantly increasing facility of communication, and the daily negotiation of loans in one state, to be made in another, and to be secured on lands or other property, perhaps in a third, it becomes an object of necessary inquiry, as to the practical operation of these conflicting statutes upon such contracts and securities.

PART FIRST.

CHAPTER I.

OF THE CONFLICT OF LAWS.

In the recognition of the laws of a foreign state, and in the selection of one of several conflicting laws, the following general principles may be adopted.

1. The obligatory force of every law is confined to the country in which it is established; and it attaches on those only who are the subjects of that country.

2. But it is considered that persons may, for this purpose, become subjects of that country, not only on account of their domicil being in it, but in respect of their temporary residence, or of their being possessed of property in it, or of their being parties, to a suit instituted before its tribunals.

3. Although the law does not by its own force operate in any other country but that which established it, or on any other persons than the subjects of that country, and the judicial tribunals of another country are not bound to recognize it; yet states, from comity and considerations of mutual interest, recognize and give effect to the laws of each other, when the rights either of their own subjects or of foreigners are derived from, or are dependent on those laws.

4. But such recognition does not take place by any foreign state, when it would be incompatible with its own authority or prejudicial to the interest of its own subjects.

5. From comity, foreign states recognize and give effect, almost universally, to those laws of the domicil, which constitute the status, quality, or capacity of the person, and which are called personal.

6. Real laws, which affect real or immovable property, are confined in their operation to the place in which the property is situated; but the judicial tribunals of another country, before which the title to that property is litigated, will consult and adjudicate according to the laws of the country in which such property is situated.

7. Foreign states recognize and give effect to those laws which affect personal property, and which, as its situs is that of the domicil, are such as prevail in the place of the domicil.

8. With respect to those laws which are called mixed laws, all dealings, contracts, wills, and other instruments, which are made in the manner prescribed by the law of the place in which they are entered into and made, are in every other place deemed valid and effectual.

9. But neither personal, real, or mixed laws will be allowed to operate on, or control the title to real or immovable property, in opposition to a prohibitory law of a contrary tendency prevailing in the place in which that property is situated.

10. The personal law of the domicil, whether permissive or prohibitory, prevails everywhere in preference to another personal law of a contrary nature, and which may be in force in the place where the property is situated.

11. A personal law which gives a permission, yields to a real law which prohibits.

12. The law which disposes of property primarily and *per se*, although it has in view the quality of the person, is a real statute; of this description are the laws of succession.

13. A law which, whilst it leaves a person the general liberty of disposing of his immovable property, limits this liberty to a certain case only, is a real statute in respect of such limitation.

14. A law which prohibits the disposition of real property in a particular case, although in respect of the status or condition which the person had acquired his disposition may be prohibited in every other case, is a personal law, if this permission be consistent with the general capacity of the party before he had acquired that status or condition, and which would be again enjoyed by him when that status or condition no longer existed.

15. That which is the predominant, direct, and immediate subject matter of the law, determines its nature and quality, whether it be real or personal.

16. The motive or end of a law, when it is so clear that no one can reasonably doubt what that motive or end is, ought also to determine its nature and quality. If the right in dispute depend on the sta-

tus and condition of the person, the law which governs the person is followed. If the question arise as to the law which should determine the rights of husband and wife, those rights not having been provided for by express contract, at the time of their marriage, resort is to be had to the law of their domicil on the day of their marriage; if they had different domicils, that of the husband is to be adopted in preference to that of the wife.

17. When a law equally affects persons and things, so as to render it doubtful whether its personal or real nature predominates, the presumption is that it is a real law.

18. In a conflict between the personal law of the domicil and the personal law of another place at variance with it, that of the domicil prevails.

19. But the preceding rule admits of some qualification. It is not to be applied when it would enable a person to avoid a contract, which he was competent to make by the personal law of the place in which he made it, although he was incompetent by the law of his domicil. Thus if a person whose domicil of origin was in Spain, where he does not attain his majority until his twenty-fifth year, should at the age of twenty-three, enter into a contract in England, or any other place, where his minority ceases at twenty-one, he would not be permitted to avoid his contract by alleging that he was a minor, and incompetent to contract, according to the law of Spain. The maxim that every man is bound to know the laws of a country in which he enters into a contract is of universal application, and is perfectly just and reasonable, because it is in his power to attain that knowledge; but the maxim, *Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus*, cannot be applied to those cases in which the condition depends on facts and law to which he is a perfect stranger.

20. In a conflict between a personal law of the domicil and a real law, either of the domicil or of any other place, the real law prevails over the personal law. Thus a person who had attained his majority, and has, as incident to that status, the power of disposing by donation *inter vivos* of every thing he possessed, may, by the real statute of the place in which his property is situated, be restrained from giving the whole, or from giving it except to particular persons.

21. The person may have at the same time one status conferring capacity, and another status conferring incapacity, for there may be capacity for some and incapacity for other acts. Thus a married woman is by the law of some countries incapable of contracting or alien-

ating by any act *inter vivos*, whilst at the same time she is capable of making a testament.

22. Movables follow the person, and are governed by the laws of the domicil. The law is not however on that account a personal, but a real law.

23. Personal actions and debts, considered in reference to those to whom they belong, are attached to the person, and are of the nature and quality which the law of his domicil assigns to them.

24. But considered in relation to the person against whom they are enforced, they are governed by the law of the debtor's domicil.

25. Immovable or real property is regulated by the law of the place in which it is situated.

26. Questions arising upon the sale of immovable property, as for instance, on the measurement of lands, are decided by the law or usage of the place in which it is situated.

27. Questions arising upon the sale of chattels, or movable effects, are decided by the law or usage of the place in which the sale was made.

28. Real actions and demands charged on, and issuing out of lands, are governed by the law of the place in which the property on which they are charged are situated.

29. With the exception of contracts of marriage which have their own particular distinctions, in order to decide whether an agreement is in itself legal, it must be ascertained whether it is conformable to or at variance with a prohibitory law, prevailing in *loco contractus*.

30. The rate of interest which may be legally reserved is decided with reference to that law.

31. The place in which the contract is to be performed is comprehended in the term *locus contractus*, and the law of that, and not of the place in which the contract is entered into, often determines its validity and obligatory effect. The *lex loci contractus* decides on its obligatory effect. Thus a contract entered into in a country, the laws of which admit it to be binding, if proved by witnesses without writing, and without any distinction as to the amount of the sum in question, would receive effect in the country where it was the subject of contestation, although if entered into in that country it would not have been binding, unless it had been evidenced by writing. A contract, however legal it may be in itself, cannot be enforced against property situated in a country, the laws of which prohibit such contract. The formalities for establishing, for authenticating, and proving acts,

are those prescribed by the laws of the place where the acts are passed, and if those have been observed, the acts are, as to their form, deemed valid in all places. The formalities which are attached to, and inherent in, the property which is the subject of the contract, are those prescribed by the law of the country in which the property is situated. 1 *Birge's Comm.* 25.

A strict adherence to the foregoing rules will avoid all the seeming conflict of the usury laws, and determine the legality of contracts made in one state to loan money in another state, and the validity of securities for the payment of such loans.

Statutes have for objects the regulation of persons, of things, and of contracts. In either case, they can properly regulate only those matters which are subject to them. Persons are subject, by reason of their domicil; immovable property, by reason of its situation; and contracts, by reason of the place of their formation.

When the people of a state enact a statute for the prevention of usurious contracts, and declare void all such contracts, it must be understood that the prohibition is intended to be against the making of such contracts in that state; for they have no power to prevent people from making contracts in other states. Such a statute, therefore, would not be sufficient to protect them; and when they go further, and enact that all usurious mortgages shall be void, of course they mean all mortgages on property subject to their jurisdiction, wherever made or wherever payable, for they have no power to annul or protect mortgages on lands in other states, exclusively governed by other jurisdictions.

In selecting the law by which it is to be determined whether the acts or instruments of alienation have been made with the necessary solemnities to render the alienation valid, the distinction must be made between those which are required for the proof or authentication of the act, and those which are required to be observed as the condition on which alone the law either authorizes the alienation, or gives to it an effect which it withholds if they are not observed. The former are called sometimes *solemnia probantia*, and the latter *solemnia habilitantia*. Thus with respect to the former, if the *lex loci contractus* treats as null and void every contract, the subject matter of which exceeds in value a certain sum, if it be not reduced to writing and proved before notaries, &c., when the notarial proof is not that which is prescribed, the contract will be void in whatever place it is enforced. So if those solemnities which the *lex loci contractus* requires have been observed, and the contract according to that law is valid and

obligatory, it will be valid everywhere else. But the latter proposition is subject to the qualification that it does not effect immovable property, subject to a law in the country of its *situs* which annuls a contract because it has not been entered into with the solemnities which it requires. If the disposition of the law does not annul the contract on account of its non-observance of the solemnities which are prescribed, but gives to it a degree of authenticity or credit which it will want if they are not observed, or if, in other words, its effect is either to dispense with a more formal proof of the instrument, if it bears on it evidence of their observance, or if, in consequence of the non-observance, it attaches a presumption against the execution of the instrument, and therefore requires from the parties a greater burden of proof, such solemnities are to be classed amongst the proof in the cause, which are governed neither by the *lex loci contractus*, nor by that of the *situs*, but by that of the forum.

The solemnities which are called *habilitantia*, and constitute the mode by which alone the alienation of immovable property is permitted to be made, or by which alone that alienation can give to the grantee or purchaser certain rights, are those which are prescribed by the *lex loci rei sitæ*. As that law may impose restrictions which may wholly or partially withhold the power of alienating immovable property situated within its territory, to which all persons owning that property are subject, it may prescribe the conditions on which such alienation may be made. Thus the law of Scotland does not permit a destination of heritage by testamentary disposition, neither does it permit certain deeds to be made *in lecto*. One of the conditions may be the form or manner in which it shall be made. This *solemnitas dispositionis is tanquam quidam qualitas rebus impressa*, and the validity of the alienation must depend on its compliance with the prescribed solemnity.

Dumolion seems to treat it as a solemnity which is of the substance of the contract, and to be governed by the *lex loci rei sitæ*. 2 *Birge*, 867–8–9.

If the law of the country in which the lands are situated has prescribed the number of years' purchase to be paid for such purchase, the legality of the purchase must be determined with reference to the law of that country, whilst the legality of the rate at which a mere personal money annuity may be purchased, will depend on the law of the place in which the contract is made.

There may, however, be cases in which the contract for the payment of the money may be governed by the *lex loci rei sitæ*, as when

a portion charged on the lands is not payable as a sum in gross, but as a rent issuing out of the lands.

In order to transfer the dominion of immovable property, its alienation must be made in the manner prescribed by the law of the country in which it is situated. This rule, which is laid down by jurists in the most comprehensive terms, is thus expressed by Stockman: Ubicumque agitur de rerum soli alienatione, mancipatione, investiturâ, successione, aliisque translationis et acquisitionis modis, inspiciantur leges loci ubi res sitæ sunt, sive quæstio sit de ætate vel aliâ qualitate, habilitate vel inhabilitate personæ, sive agatur de statuo verbis in rem sive in personam directè concepto; cum effectus ipse potius quam verba attendendus sit, qui prorsus realis est, quoties de rebus soli transferendis et mancipandis quæritur, atque proinde ab hoc effectu statutum omne, quod huc respicit vel eo rem deducit, pro reali habendum judicandumque sit.

The rule is thus stated by Mr. Erskine, in his Institutes of the Law of Scotland:—

"Although obligations to convey, if they be perfected *secundum legem domicilii*, are binding here, yet conveyances themselves of subjects within Scotland are not always effectual, if they are not executed according to the solemnities of our law. As to which, the following distinction appears to be observed. In the conveyance of an immovable subject, or of any right affecting heritage, the grantor must follow the solemnities established by the law, not of the country where he signs the deed, but of the state in which the heritage lies, and from which it is impossible to remove it; for though he be subject with respect to his person, to the *lex domicilii*, that law can have no authority over property which hath its fixed seat in another territory, and which cannot be tried but before the courts and according to the laws of that state where it is situated; and this rule is so strictly adhered to in practice, that a disposition of an heritable jurisdiction in Scotland, executed in England after the English form, was not sustained even as an obligation to compel the grantor to execute a more formal conveyance." *Feb.* 1729, *E. Dalkeith, Dict. p.* 4464. *Ersk. b.* 3, *tit.* 2, *sec.* 40.

There is a perfect uniformity in all systems of jurisprudence in the adoption of this rule. 2 *Birge*, 865, *and authorities there cited.*

The obligation of a contract which though often confounded with, is distinguishable from, its nature. The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of ob-

ligation generally, we mean legal obligation, that is, the right to performance which the law confers on one party, and the corresponding duty to performance to which it binds the other. It may possess a legal obligation, but the laws may limit the extent and force of that obligation in *personam* or in *rem*. It may bind the party personally, but not bind his estate, or it may be revocable or dissoluble in certain future events, or under peculiar circumstances. *Story on the Conflict, sec.* 266, *p.* 222.

The law of the place where the contract is made, is to determine the rate of interest, when the contract specifically gives interest, and this will be the case, though the loan be secured by mortgage on lands in another state, unless there be circumstances to show that the parties had in view the laws of the latter place, in respect to interest. When that is the case, the rate of interest of the place of payment is to govern. 2 *Kent's Comm.* 460. *4th ed.*

The principle is, that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est ut jus nostrum, quam jus alienum servemus.* Idem. 461.

Suppose a contract made in New York, where interest is seven per cent., to loan money at New Orleans at a future day on Louisiana interest, and to secure such loan by a mortgage on lands in Virginia; might not a Court of Equity, sitting in either state, consistently enforce the specific performance of this contract in *personam?* Again, suppose the contract were to execute a mortgage on Virginia lands, reserving Louisiana interest upon the mortgage; could a Court of Equity, in either state, compel the specific performance of a contract in violation of the laws of a sister state? and if not, could it go halfway and enforce the contract in part? or could the Court, from the above facts, make in part a new contract for the parties? It is presumed not. In such case would not the whole contract be void? The lender would be unwilling to accept a six per cent. security, and the borrower unwilling to give other security than the original stipulation. The learned commentator must, therefore, mean that the law of the place where the contract is made will, as a rule of evidence, determine the rate of interest the parties intended to stipulate for, and the legality of the contract of loan, if made there; but the law of the land upon which the mortgage is given must certainly determine the legality of the mortgage in the other state. Indeed, Chancellor Kent admits that in the next page, where he says, "*In tali conflictu magis est ut jus*

nostrum, quam jus alienum servemus". If otherwise, it would be a contract in one state to violate the law of a sister state.

"In those countries in which courts are called upon to inflict a penalty upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise, for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule, that it is unlawful to contract to do that which it is unlawful to do. The answer would seem to be plain and obvious, that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violating the laws? There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is in itself illegal. The action is apparently founded on a contract to disobey the law. The defence set up proves the principle of the contract. Then how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature; how then can we enforce a contract to do that very thing which is so much reprobated by the act? The Court cannot give any assistance to the plaintiff, consistently with the principles which have governed courts of justice at all times.—Persons who engage in such transactions must not bring their cases before a court of law." *Per Justice Johnson*, 2 *Peters*, 540.

When land is the substance of a contract, or when a mortgage on land is so far the inducement of a contract, as to be that without which the contract would not have been entered into, does not the *lex loci rei sitæ contractus* entirely govern the *lex loci contractus*, and the *lex domicilii?*

This question has never been judicially settled by our own courts. The case of Van Scaick *v.* Edwards, 2 Johns. Cases in the New York Supreme Court, where the Judges were divided in opinion, determines nothing.

"A foreign state can indeed only act upon the question remedially. It disclaims the power of jurisdiction to carry into execution the penal laws of the offended state. But where it is called upon to protect its own citizens from the force of a contract entered into, in violation of the law of the place of contract, and expressly against the policy of our laws, it must carry into effect the remedial and salutary provisions of our acts of assembly, instead of affording them the more scanty protection of foreign law. It could not be endured that

a griping usurer of a northern city should be permitted by the judgments of our own courts to recover the full amount of his principal and interest, though, for the protection of our own people, we have declared that the usurer should lose his interest. The contract wherever made, and wherever the money was payable, was to be enforced here. The party must have looked to our forum for redress in case of default of the debtor, and he must, of course, be governed by the law of that forum in relation to his remedy. We cannot give him a remedy for more than his principal. We are not bound to recognize and enforce a vicious contract, injurious and indeed ruinous to our own people, except upon the terms and conditions which our own legislation has imposed. The comity due from one state to another extends not so far. The usurious contract in this case, though not *punishable* by our own law, because not entered into in Virginia, *is in violation of our law* and not protected by any other, and in such case the rule must be *magis jus nostrum quam jus alienum servemus.*" *President Tucker*, 8 *Leigh*, 112, 13.

"The question therefore, whether a contract is usurious or not, depends not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract is made, and is to be executed. (1 Ryan & Moody, 184.) A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would nevertheless be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate, would be valid in favor of the English creditor."

This, too, seems to be the doctrine propounded by Rodenburgh. (See Story, Conflict, section 292.) Burgundius is still more direct and positive.

"And in cases of this sort, it will make no difference (as we have seen) that the due performance of the contract is secured by a mortgage or other security upon property, situate in another country, where the interest is lower. (2 Atkins, 382.) For it is collateral to such contract; and the interest reserved being according to the law of the place where the contract is made, and to be executed, there does not seem to be any valid objection to giving collateral security elsewhere to enforce and secure the due performance of a legal contract." *Story, sec.* 293, *p.* 243.

But the law of the collateral or accessorial mortgage, must be strictly complied with, or such mortgage would be void, however valid the contract of loan. The law of the land is of necessity the law of the mortgage. There can be no legal right without a legal remedy,

and therefore, to invoke the aid of foreign law, it must conclusively appear that the contract was made with reference to such foreign law, and within the reach of its remedial powers. This can never appear in a mortgage of realty; and as the forum of the land can administer no remedy without the provisions of its own legislation, it conclusively follows that no other legal right was contracted in relation to the land. But a principle, wholly different, may govern the bond. The law of the debt is the law of its origin; since the law of the debt can alone give interest on it, its complexion will not be changed in any other state, until a new computation takes place. Indeed, it has been remarked that "the interest, originally mounted, retains its dress to the end of the mail route." A new computation creates a new debt, if lawful, and merges the original. But a debt, originally lawful, can never be drowned in a subsequent usurious security, nor will the taking of usurious interest, upon a debt originally valid, make the debt usurious; but such subsequent taking of usurious interest is strong evidence of an original agreement to receive it, and, if not rebutted, will be, in most cases, conclusive of an originally usurious contract.

There is a seeming inconsistency in the fact, that on a debt arising in New York where interest is seven per cent., and prosecuted in North Carolina where interest is but six per cent., the plaintiff should be permitted to recover principal and seven per cent.; when a bond subsequently given in North Carolina for the same consideration, reserving seven per cent. interest, during the time the bond has to run, would be usurious and void. But the thing is explained in this way. If the bond subsequently executed in North Carolina be mae payable at a future day for the principal and seven per cent. interest added, up to the day of payment in gross, then it is a mere security for the original New York debt, and perfectly valid, as being no more than a court would give at the day of payment in action brought. But if a new computation takes place on giving the bond for principal and seven per cent. up to the date of the bond, it then becomes a North Carolina debt of that date, and the subsequent reservation of more than North Carolina interest, during the time the bond has to run, will make it usurious and void; as the latter would be a new contract in North Carolina at the date of the bond, in violation of the statute; yet had no such new contract been made, the New York debt would have carried its own interest and arrived at precisely the same amount. Therefore, to retain the New York interest it is necessary to retain the New York

debt; if that be dropped, the North Carolina debt of necessity will carry the interest of its origin, though prosecuted in New York.

A contract in one state may be distinctly made with reference to the laws of another state: in such case, the law of the latter will govern; but in order to make a contract in one state with reference to the laws of another, so as to be governed by it, a mere nominal reference will not answer; it must be the inducement and subject-matter of the contract to legally fix the reference. For it is always a question, whether the parties had in view the law of the place of contract and its penalty, with an intent to run away from it, or a *bona fide* reference to another state, with an honest object to get within it; and the question can only be solved by the particular circumstances of each case. What is the object of the contract? What is the object of the negotiation? Where are the funds to be advanced? and frequently, Where is the place of payment? If the object of the borrower be to obtain money for general purposes, and the object of the lender to get a greater amount of interest than the law of the place of contract allows; then the contract is clearly bad, and within the law of the place of contract. A contract ismade in one state with reference to the law of another, when its performance must necessarily call into exercise the *status* or capacity conferred by the law of such other state; and each contractor must exercise the capacity according to the law of the place *ubi ut solverit se obligavit.*

If the borrower intend to use the funds upon a subject principal that can lawfully carry the contemplated interest, such as land or other object beneficial to the locality of reference, and the lender honestly intends to remove his funds for the purpose applied for, and to advance them there, the contract is good, and made in reference to the foreign law, for it is under the protection of foreign law he agrees to advance his funds. But the object of the *lex loci contractus* is to prevent the receipt of greater interest than a specified rate, and this law cannot be evaded by distant or foreign machinery. To attempt to evade the law, is to come within its operation. Therefore, to lend money in New York to be returned in New Orleans, with more than seven per cent. interest, is just as much within the statute as a direct receipt of the money in New York, for "*qui facit per alium, facit per se;*" the receipt in New Orleans, is in fact a receipt by the lender in New York, through an agent of the lender in New Orleans, by virtue of a vicious contract in New York.

The *status* or capacity to reserve interest, is conferred by the law

of the place *where* the creditor becomes such, that is, where the creditor advances his funds or forbears his debt already due; and not by the law of the place *where* the debtor promises to pay, or the parties previously negotiate the loan.

"The general principle in relation to contracts made at one place to be executed in another, is well settled. They are to be governed by the laws of the place of performance, and if the interest allowed by the laws of the place of performance be greater than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. When a contract has been made without reference to the laws of the state where it was made, or to the laws of the place of performance, and a rate of interest was reserved forbidden by the laws of the place where the contract was made, which was concealed under the name of exchange, in order to evade the law against usury; the question is not which law is to govern in executing the contract; unquestionably it must be the law of the state where the agreement was entered into, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bona fide* agreement, made in one place to be executed in another. In the last mentioned cases, the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there it is void everywhere." *Per Chief Justice Taney*, 13 *Peters*, 65.

In what does the offence of usury consist? Does it consist in the corrupt bargain, or in the payment? There can be no doubt that it consists in the original contract in the reservation of excessive interest; if the offence were not complete until the payment, the creditor might recover his principal by waiving the demand for interest. But the principal is forfeited as a penalty for making the illegal contract. If then there has been no corrupt bargain, if upon the loan no more than legal interest has been reserved, there is no illegality in the borrower, at the time of payment, freely and voluntarily making to the lender an additional compensation. But if there has been an original corrupt bargain or loan, upon which usurious interest has been afterwards paid, the excess of interest so paid may be recovered back. All of this shows that the offence against the statute is consummated at the time of making the contract. *Livermore's Argument.*

Taking the several laws together, and for the purpose of reconciling them, it is considered that where a contract is made in one place, to be performed in another, there are two places of the contract; that where the obligation is contracted and that where it is performed. The interest which the law gives without any stipulation, is regulated by the law of the place of payment, for it is there that the default which gives rise to such interest takes place. The claim for such interest is not coexistent with the contract, nor does it proceed from the contract, but from a new cause which happens subsequent thereto. This new cause is the delay of payment, which happens in the place where the payment ought to be made, and is consequently regulated by the law of that place.

Interest stipulated by the creditor is of an entirely different nature. The right to that is coexistent with the contract, and proceeds from the contract. It is necessary, therefore, to distinguish between those things which are of the nature of the contract, or belong to its original formation, and those things which arise *ex post facto* from the default of the parties.

Burgundius cites a case decided by the parliament of Flanders, in which he was of counsel, where it was decided that an annuity stipulated in France but payable in Flanders, was lawful, although the rate was one in twelve, and in Flanders it was not permitted to stipulate a higher interest than six per cent. This, he says is to be understood of stipulated interest, and not of those which are incurred by delay of payment.

Every endorser is considered as the drawer of a bill. Suppose the law of a state in which a bill is endorsed, has provided that an endorsement should merely pass the property, and not subject the endorser to any liability; would an endorser in such state be liable, in case of non-payment, by reason of a different law of the country in which the bill is drawn? Certainly not. Nor is the principle, that all obligations resulting from a bill of exchange are governed by the laws of the place at which it is payable, admissible. The holder of a protested bill of exchange has his remedy against the acceptor according to the law of the place *on* which the bill is drawn; against the drawer, according to the law of the place *in* which the bill was drawn; and when there are several endorsers he may have his remedy against each of them, according to the law of the place *where* he endorsed. Reason points out that, in every act, the place in which it is to take place is to be considered, in ascertaining its validity and effect. If these principles be correct, there must be two

loci contractus to be considered in law, in a contract which is to be performed in a different place than that in which it is entered into; *locus celebrati contractus—locus solutionis.* In many an instrument more than two places as *loci contractus* are to be considered.

"The distinction, as to the parts of a contract which are to be governed by the laws of the place in which it is entered into, and those which are to be governed by the laws of the place in which the payment was intended, is well marked. In the first class is first included whatever relates to the form and perfection of the contract, and all the ceremonies and formalities attending it. In the same class are next to be placed all matters resulting from the nature of the contract, or immediately therefrom. As to what concerns the performance of the obligation, the payment of the sum, or the delivery of the thing which is the object of the contract, the presentation for acceptance and payment of a bill of exchange, the acceptance, days of grace, protests, weights, measures, damages arising from negligence or delay, the *locus destinati solutionis* is to be considered. But as to the party, with whom he who binds himself to pay money, as to the obligation of the vendor, who has stipulated for payment in a place different from that in which the sale takes place and the thing is to be delivered; the contract as to the period at which the property of the thing sold, passes to the vendee; the mode of delivery, the obligations of warranty, the manner of his being put *in mora*, the liability to the redhibitory action, or that *quanti minoris*, the law of the place, in which the vendee bound himself to pay, affords no legitimate rule of decision; for the vendor did not bind himself to perform any act there, that is not the place *ubi ut solverit se obligavit.* As to him, that place is the one in which he bound himself to deliver the thing sold and to warrant it; and we are to resort to the law of this last place, to ascertain whether his (the vendor's) obligations were duly performed, and to assess the damages due to the vendee, if they were not; because as to the vendor, that place is, in the language of Everard, *locus ubi deliberatis destinatus.* Certainly, in a bilateral, synallagamatic contract, where the obligations of the parties are to be performed in different places, in which different laws and usages prevail, the laws and usages of neither can offer a legitimate rule of decision for all the obligations of the contract. Each party must perform his according to the law of the place *ubi ut solverit se obligavit*—and in case he fails, he must yield to his adversary damages equal in value to that of the thing he bound himself to deliver at the place *ubi solutio* or *deliberatio destinatur.*

"In obligations to pay money, the measure of damage is interest, according to the legal rate. The Roman law considers interest rather as damages, to be allowed for the delay of payment, than as a profit contemplated at the time of the contract. But in a loan of money, nothing is more common in countries where the parties are not restrained by law to one rate of interest, to stipulate a particular one (by their convention) within the scope which the law allows, and the interest is called conventional, in contradistinction from the legal interest *ex mora.* In such case the object of the conventional interest is to afford to the lender a compensation for the profit he foregoes in yielding the use of his money to the borrower. It should seem that the circumstance of the place of payment differing from that in which the lender parts with his money, ought to have no influence in fixation of the interest." *Judge Martin,* 20 *Martin, p.* 1.

If parties could free themselves from the effect of the laws of their country, by stipulating for payment elsewhere, they would sap the foundation of every law enacted for the weak and necessitous.

The law and usage of the place where the contract was entered into, as a rule of evidence, will determine what the contract really was or was intended to be, where the written evidence of the contract is not sufficiently explicit; but where the terms of the contract are specifically defined, as interest at a fixed rate per cent., the rule is inapplicable. The law of the place where the debt arose, or the consideration actually passed, will determine the legality of the contract. And the law of the place of payment will absolutely govern as to the remedy contracted for, in case of default of payment by the debtor.

A clear distinction must be made between the effect of a default of performance in one state, and an express stipulation in the contract at the time of entering into it in another state, as the consequence of a default. The one is the condition of and part of the contract, and governed solely by the law of the place of contract; the other is no part of the contract, but the mere operation of the law where the default took place in consequence of it. The question as regards usury always is, where did the debt arise, and not where was the contract entered into. The law of the debt is the law of the interest.

On a debt arising by contract, damages will be given according to the law of the place of default of performance, but interest by stipulation will be given according to the law of the contract. As when A lends B at New York $100 without reservation of interest, to be paid at New Orleans, and default is there made, damages will be recoverable at the rate of Louisiana interest from the default. But had A lent

the same sum upon interest at New York, payable at the same place, and default arise, interest could only be recovered at the rate of New York. In the latter case, the interest arises *ex contractu*, by the law of New York; in the former *ex mora*, by the law of Louisiana, where the default arose; and had A stipulated at New York for Louisiana interest, though payable at New Orleans, the contract had been utterly void. And if A agree in New York to lend B the same amount in Virginia payable in New Orleans, neither New York nor Louisiana interest can be reserved; but the law of Virginia will determine the legality of the interest contracted. For that is the place of performance as to the lender, where he agrees to part with his money and to become entitled to a profit therefor; though New Orleans is the place of performance as to the borrower.

In conclusion, it seems that the place of payment has nothing to do with the question of usury, as that is incurred by stipulation only, and the law of the place of that stipulation can alone determine the legal rate of interest, and consequent validity of the contract, except where the lender stipulates in one place to lend his money in another place; and in that case, the law of the place where the loan is to be made, must be strictly complied with as the locality of reference.

It next becomes necessary to notice the several cases, which the courts, in the interpretation of the several acts, have considered as within the pale of those acts, as well as those transactions which they have acquitted of the vice of usury. Previous to which, however, it will be necessary to premise one thing.

The British act of Anne, like those of Elizabeth, James, and Charles, is founded upon the statute of Henry the 8th, and, indeed, varies very little in any other substantial respect, than the substitution of one rate of interest for another; it follows, therefore, that the cases which have been decided on the statute of Henry, are to be taken as authorities applicable to all the subsequent statutes founded thereon; and that the decisions upon the respective statutes of Elizabeth, James, and Charles, which partake of the spirit and expression of that of Henry, are to be considered as applicable to the 12th of Anne. And that the English decisions upon the statute of Anne, are applicable to all the American statutes which partake of the spirit and expression of the act of Anne, upon which they have mostly been founded, and are consequently authorities in those states where a forfeiture still prevails.

CHAPTER II.

WHAT CONTRACTS ARE AND ARE NOT USURIOUS WITHIN THE STATUTE OF ANNE, AND THE STATUTES OF THE SEVERAL STATES FOUNDED UPON THE SAME.

In order to consider this subject as distinctly as possible, it will be divided into the following sections.

1st. Where the contract existed previous to the statute.

2d. Where the usury has been incurred by mistake.

3d. Where there is a hazard.

4th. Where the contract is in the form of a *post obit*.

5th. Where the contract is in the form of an annuity or rent charge.

6th. Where the interest is in the nature of a penalty, or where the redemption is at the option of the borrower.

7th. Where goods are advanced instead of money.

8th. Where stock is transferred.

9th. Where something besides interest, paid as such, is to be allowed for the loan.

10th. When an extra sum is to be paid for brokerage, &c.

11th. For discounting and negotiating notes.

12th. For prompt payment.

13th. When compound interest is to be taken.

14th. Where the interest is the difference between the cash and credit price of an estate sold.

15th. The sale of foreign funds.

SECTION I.

Where the contract existed previous to the statute.

It will be seen that the legislatures of most of the states, in framing their general acts against usury, have inserted a clause which

seems to put it beyond doubt, that the statutes are not retrospective. A few cases, however, have arisen, which have occasioned the following decisions:

Action on note, dated 13th Sept., 1797, and becoming due twelve months thereafter.

At the date of the note, the legal rate of interest was five per cent.; before it became due, the act of assembly changing the rate of interest to six per cent. passed, and the question is, whether the law, as it was at the date of the note, or at the time it became due, should be the rule of decision with respect to the rate of interest. Between the right arising from a contract, and the remedy to enforce it, there is a manifest distinction. The latter must, of necessity, be regulated according to the law of the time and place in which it is sought; but it is a settled rule, that the former is to be governed by the law at the time and place of making the contract; and that the rate of interest which should be allowed on a contract, relates to the right and not to the remedy, is indisputable. It seems therefore to follow, as a necessary consequence, that the rate of interest should be regulated in this case by the law, as it was at the date of the note. *Lee* v. *Davis*, 1 *A. K. Marshall's Rep.*, 396.

When a judgment has been recovered upon a note, alleged to be usurious previous to the act of 1837, for the prevention of usury, *Held*, that the party, against whom the judgment was recovered, could not come into the Court of Chancery, for discovery and relief against the judgment, without offering to pay the money actually lent, and legal interest thereon. *Campbell* v. *Morrison*, 7 *Paige*, 157.

Where a usurious negotiable note was made before the act of 1837, repealing the provisions of the Revised Statutes, making such notes valid in the hands of *bona fide* holders, it cannot be transferred subsequent to the passing of that act, so as to prevent the maker of the note from setting up the defence of usury. *Morse* v. *Hovey*, 9 *Paige*, 197.

Where a note, prior to the act of the 15th May, 1837, was tainted with usury, and afterwards renewed from time to time, but no fresh usury occurred, the original taint was kept upon it, and brought it within such statute, and no offer to pay was necessary to be made in the bill. *Folsom* v. *Blake*, 3 *Edwards*, 442.

SECTION II.

Where the illegal interest is reserved by mistake.

Where usurious interest is reserved by mistake, as upon an accidental miscalculation of figures, the contract it seems, is not thereby avoided. However, if the agreement be *clearly* usurious, it is void, though the parties did not intend it to be so, and were ignorant of the effect of their contract. *Marsh* v. *Martindale*, 3 *B. & P.* 150. *Barnard* v. *Young*, 17 *Vesey*, 44. *Enderly* v. *Gilpin*, 5 *Moore*, 588 *Solarte* v. *Mellville*, 7 *B. & C.* 430. 1 *M. & R.* 19. 9 *Mass.* 55. 15 *John.* 152.

It was observed by Lord Tenterden, in *Bete* v. *Bidgood*, that the Court would look not at the form and words, but at the substance of the transaction; and that as, on the one hand, they would *not* pay attention to the words of the contract, if the substance of it went to defeat the provisions of the statute, so, on the other hand, they would not rely upon the words, so as to defeat the contract, if in substance the transaction were legal.

To constitute usury, there must be an intention to take more than legal interest. The mistake of a scrivener in putting one sum for another, will not charge a party with usury. If a mode of calculating interest, which gives the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law. *Childers* v. *Dean*, 4 *Randolph*, 406.

Examples of mistake, miscast, miscount of money &c. 2 *Cow.* 678. But the adoption of an erroneous principle of calculation, which gives more than seven per cent. per annum, and receiving the discount or interest according to that principle, is usury, though the lender believe he has a legal right to do so. 2 *Cow.* 678.

A mistake in the construction of the statute of usury, if it results in taking more than legal interest, will render the contract usurious. But an error in *fact*, by which more than the legal rate of interest is reserved will not vitiate. 3 *Dev.* 30.

A contract reserving more than legal interest on its face, is *prima facie* evidence of a corrupt agreement, which is the foundation of usury; but this may be repelled by showing that more than legal interest was reserved by mistake; e. g. a mistake of the scrivener in wording the bond, whether such mistake be of the fact or of the law. 3 *Cow.* 284.

Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated exceeded six per cent. The receipt of the bill at the foot of the account stated, that in case of error either way, should any be discovered, it should be corrected. Held, that this was no evidence of a usurious agreement. *Stackell* v. *Etheall*, 3 *Gill & Johnson*, 123.

Mistake of two cents in a discount is not evidence of usury. 10 *Gill & Johnson*, 209.

More than legal interest reserved or secured through a mistaken calculation creates no forfeiture. *Gibson & Stearnes*, 3 *N. H.* 185.

Where a note is given upon a compromise, embracing more interest than is lawfully due, both parties believing it lawfully due and recoverable, it is not usury. *Ellis* v. *Bibb*, 2 *Stewart*, 63.

Testimony of a general practice of taking interest at banks, according to printed tables not exactly correct, and that such practice has existed a long time without being resisted, is proper, and may be conclusive to show, that the extra interest was not taken corruptly. *Bank of Burlington* v. *Durkee*, 1 *Vermont*, 339.

A bank note is not void as usurious, by reason of interest being taken for sixty-four days at the rate of three hundred and sixty-five days to a year, that being a general custom at banks, but the excess must be deducted. *Bank of St. Albans* v. *Stearnes*, 1 *Vermont*, 430.

SECTION III.

Where there is a hazard.

Bottomry is not a communication for the loan of money, but a partnership for the honest intention of seeking a livelihood by trade. To constitute usury, there must be a loan of money, which money also is to be repaid, and there must be a premium for the loan of that money of more than the legal rate. Nor shall any artificial contrivance whatever evade the statute. And if the contract is a colorable agreement only to avoid the statute of usury, and is really a communication for the loan of money, it is within the statute. But it is no contract for a debt due, where it is upon a contingency that may never happen. No contract is usurious where the lender runs the hazard of losing all his money, both principal and interest, as in the case of bottomry. The distinction is, whenever a contract for the loan of money is upon a contin-

geney that is *colorable*, or so *slight* as is contrived merely to avoid the statute, the statute shall have its effect.

A ship, going in the fishing trade to Newfoundland, (which voyage must be performed in eight months,) the plaintiff gave the defendant £50, to repay £60 upon the return of the ship to Dartmouth; and if by leakage or tempest she should not return in eight months, then to pay the principal money (£50) only, and if she never returned, then he should pay nothing. All the Court held that this is no usury within the statute; for if the ship had staid at Newfoundland two or three years, he was to pay but £60 upon the return of the ship; and if she never returned, then nothing; so that the plaintiff runs the hazard of having less than the interest which the law allows, and possibly neither principal nor interest. *Sharpley* v. *Hurrel*, *Croke Jac.* 208.

The obligor was bound in a bond of £300, conditioned to pay £22 10s. premium at the end of the first three months after date, &c., and sixpence in the pound at the end of six months as a further premium, together with the principal itself, in case the obligor be then living; but if he dies within that time the principal to be then lost. Adjudged this is an usurious contract, because there was a possibility that the obligor might live so long, and there is an express provision to have the principal again. In Carthew 67 S. C. adjudged upon a general demurrer, that this was an usurious contract; and if such contingency of the death of a man in full health should prevent the usury, contingencies might be extended to the death of two, or three, or more, and so the statute be of little use. 3 *Salked*, 390.

The case of *Joy* v. *Kent*, *Hard.* 418, was an action of debt upon an obligation to pay so much money, if such a ship returned within six months from Ostend in Flanders to London, which was more by a third part than the legal interest of the money; and if she do not return, then the obligation to be void. The defendant pleaded that it was a corrupt agreement, and that the obligation was entered into by covin to evade the statute of usury and the penalty thereof. Lord Chief Baron Hale held clearly that this bond is not within the statute; for this is the common way of assurance, and if this were void, said he, by the statute of usury, trade would be destroyed; and not like the case where the condition of a bond is to give so much money, if such or such a person be then alive, for there is a certainty of *that* at the time; but it is uncertain and a casualty whether such a ship shall ever return.

A rent charge of £20 per annum for £100 for eight years on a contingency, yet usury, if for a loan, though principal in hazard. *Symonds* v. *Cockerill*, *Noy*, 151.

Roberts *v.* Tremayne.—*Held*, usury there on a contingency.—The 17th of May, 1738, defendant paid £5000 to *Spencer*, and the same day took a bond from him in the penalty of £20,000; conditioned for the payment of £10,000 to the defendant, at or within some short time after the Duchess of Marlborough's death, *in case* Spencer should survive her, but not otherwise. The Duchess died Oct. 18, 1744, and in the month of December following, the defendant delivering to Mr. Spencer the bond to be cancelled, he executed a new one in the penalty of £20,000, conditioned for payment to the defendant of £10,000, with lawful interest, on the 19th of April next, and at the same time executed a warrant of attorney to empower judgment to be recorded against him in B. R. for the £20,000, which was accordingly done.

In December, 1745, Spencer paid the defendant £1000 in part, and on 21st March £1000 more. On the 17th June, 1746, Spencer died, but before his death made his will, and, after payment of debts, &c., gave the residue of his personal estate to his son, and appointed plaintiff his guardian and executor in trust during his minority. Bill brought to be relieved against defendant's demand, as being an unconscionable and usurious contract. The Court relieved only against the penalty and judgment, by directing the defendant to deliver up the bond to be cancelled, and to acknowledge satisfaction on the judgment upon being paid by plaintiff what should be due at law, but would not give him costs, as there was *probabilis causa litigandi*, and defendant's case is far from being favorable. 1 *Atk.* 301.

And when persons are actually in partnership, an advantage to be taken out of the trade may be measured in any way agreed on; for the money is not lying at interest, but employed in making profits, and subject to losses; and although one partner retires, still, *if he continues liable to be sued*, the agreement for such advantage cannot be usurious. 2 *Vesey, Jun.* 248.

Though the circumstance of a hazard attending the principal will exempt the transaction from the operation of the statute, yet this hazard must be real and *bona fide;* for if the substance of the contract be a *borrowing* and *lending*, a slight contingency only will not take the case out of the statute. *Per Burnett J., in Chesterfield* v. *Jansen*, 1 *Atk.* 341.

At a time when the State Bank of N. C. had suspended specie payments, the defendant offered to the bank a note for discount, accompanied by an offer, in case his note should be discounted, to exchange an equal amount of northern funds for N. C. Bank notes. A bill was accordingly drawn upon a firm in Virginia at ninety days, and

the same being accepted, the bill and note were both discounted, with a further condition annexed to the note, that it should be paid in Virginia or *other northern bank notes.* The bank paid for the bill and note in its own notes in part, and in part in the notes of other banks in N. C., all of which were, at the time, under par in Raleigh from three and a half to four and a half per cent. At the time of the discount, suits were depending against the bank upon its notes to coerce payment of them. The notes received by the defendant were, in the presence of the president and cashier of the bank, handed over to the acceptor to meet his acceptance with them, and then pay the balance to the defendant; the president and cashier knowing the loss to which the defendant would be subjected. The notes were sold in Virginia at a loss of from two and a half to three and a half per cent., and the bill paid at maturity in Virginia or United States Bank notes. These notes were at par at the time of the discount, and the president and directors of the N. C. Bank knew at the time that their notes were not of equal value. Held, notwithstanding, the transaction was not usurious—Tucker, Pres't, dissenting. *State Bank of N. C.* v. *Cowen*, 8 *Leigh*, 238.

Upon the principle that there was some contingency, as *other northern funds* might be of Philadelphia, New York, or Boston, at three or four per cent. below par; and the bank in such case might not receive more than six per cent. after all.

The statute against usury does not apply where a loan is made to be returned within a certain time, or upon a certain event depending upon a casualty which hazards both principal and interest, without any right to look to the borrower. *Dowdall* v. *Lennox*, 2 *Edw.* 267.

A contract to take for the loan of one hundred and forty-two shares of bank stock for a year, thirty additional shares, is not void under the statute of usury; for the one hundred and forty-two shares to be returned may not, at the time of returning them, be of any greater value than the one hundred and forty-two shares received, at the time of receiving them, with the dividends or interest added. *Steptoe* v. *Harvey*, 7 *Leigh*, 501.

Where upon a loan of money, the lender, besides his principal, contracts to receive, in lieu of interest, something which *may* be worth more than six per cent. per annum, though it may perhaps prove to be worth less, as the dividends on bank stock, the contract is usurious. A debtor owing a certain number of shares of bank stock, agrees with his creditor to pay him, at a future day, the market price of the stock on that day, or $150 per share, at the creditor's option,

with the dividends. *Held*, the contract is usurious. *Smith* v. *Nichols*, 8 *Leigh*, 830.

From the foregoing, it will be seen that hazards, as excepted from the statute of usury, may be divided into four classes:

First. Where the day of payment may never come. For that cannot be said to be foreborne which has not become, and never may become due.

Second. Where the time fixed for payment will certainly arrive, but the obligation may not survive the day: as where, "in consideration of two guineas received of Aaron Lamego, I promise to pay him twenty guineas on the decease of my present wife, Ann Gould." Ann Gould will certainly die, but Gould, the husband, may first die, and this is but a lost wager. *Burr*, 715.

Third. Where more than legal interest is reserved, and upon that it may be regarded as certain the day of payment will arrive; but where there is a risk upon the creditor, that his principal may be entirely lost. *See Jacob*, 144. 4 *Cond. English Chan Rep.* 64, 65. 5 *Barn & Ald.* 954. 7 *Eng Com. Law Rep.* 314.

Fourth. Where time of payment will certainly arrive, but it would depend upon the value of the commodity at the time of payment, whether it would amount to more than principal and legal interest. *See* 8 *East*, 304. 3 *Term Rep.* 531. 5 *Esp. N. P. Cases*, 164. 5 *Cowan*, 144–149. 4 *Wend.* 679.

SECTION IV.

Where the contract is in the form of a post obit.

And though, in the case of Lushington v. Waller, it was said that a *post obit* bond is a security of a questionable nature, which has often been disputed with success; and in point of fact there are instances in which the courts have relieved against such bargains, yet it does not seem that they have ever been considered as *usurious*, however gross and extortionary they may have been; but merely looked upon as *unconscionable bargains*, against which relief can be obtained in a Court of Equity alone. *Matthews* v. *Lewis*, 1 *Anstr.* 7; *and see Butty* v. *Lloyd*, 1 *Vern.* 141. *Same case*, *Eq. Ca. abr.* 275; *and see Berny* v. *Pitt*, 2 *Vern.* 44, *and Knott* v. *Johnson*, 2 *Vern.* 27; *and see Wharton* v. *May*, 5 *Ves. Jr.* 27.

SECTION V.

Where there is an annuity or rent charge.

An annuity may be purchased like a tract of land or other property, and the inequality of price will not, of itself, make the contract usurious. If the inadequacy of price be great in any purchase, it may lead to suspicion, and, connected with other circumstances, may induce a Court of Chancery to relieve against the contract.

The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these, is the purchase of annuities secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard, but because it was not the intention of the legislature to interfere with individuals, in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit.

The purchase of an annuity, therefore, or rent charge, if a *bona fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts therefore perceived the necessity of disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it. Though this principle may be extracted from all the cases, yet as each depends on its own circumstances, and these circumstances are almost infinitely varied, it ought not to surprise us if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstance. *C. J. Marshall.*

The leading English cases on this subject are, *Fuller's case*, 4 *Leon.* *Symonds* v. *Cockerill*, *Noy*, 150. *King* v. *Drury*, 2 *Lev.* 7. *Lawly* v. *Hooper*, 2 *Atk.* 278. *Richards qui tam* v. *Broome*, *Cowper*, 770. *Irnham* v. *Child*, 1 *Br. Ch. Rep.* 93, *Drew* v. *Power*, 1 *Scho. & Lef.* 182. *Marsh* v. *Martindale*, 1 *Bos. & Pul.* 153. *Noy*, 151. *Low* v. *Waller*, *Doug.* 735.

These cases turn on the evidence which should be sufficient to prove a loan to be the foundation of the contract, but do not withdraw the case from the statute, if a loan be its foundation. They decide that a mere application for a loan does not convert a subsequent annuity, which yields a profit beyond the legal interest, into a usurious contract;

but that an actual contract for the loan, if converted into an annuity in order to avoid the law, is within the statute.

In the United States the case of *Scott* v. *Lloyd*, 9 *Peters*, 418, with the able review of Chief Justice Marshall, is of paramount authority.

One Scofield granted to William S. Moore an annuity to issue from four houses and lots in Alexandria, and covenanted that the same should be paid to M forever thereafter. In the deed granting the rent charge, M, the grantee, covenanted that at any time after five years, on the payment of five thousand dollars, with all arrears of rent, he would release the rent charge, and the same should cease. S covenanted to keep the buildings in repair, and have them insured against fire, and assign the policy to M; the money from the insurance to be applied to rebuilding or repairing the houses if destroyed or injured by fire.

Afterwards S, by deed of bargain and sale, conveyed to Lloyd the houses and lots of ground, subject to the payment of the rent to M. The rent being unpaid, M levied a distress for the same, and Lloyd brought a replevin. Moore avowed the taking, stating the rent charge and arrears of rent; to which Lloyd pleaded usury, and defendant demurred to pleas: and per curiam. The requisites to form a usurious transaction are, 1st. A loan, either express or implied. 2d. An understanding that the money lent shall or may be returned. 3d. That a greater rate of interest than is allowed by the statute shall be paid. The intent with which the act is done, is an important ingredient to constitute this offence. An ignorance of the law will not protect a party from the penalty of usury where it is committed; but where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract or by other proof, can be shown to have been the result of accident or mistake, no penalty attaches.

The purchase of an annuity or any other device to cover an usurious transaction, will be unavailing. If the contract be infected with usury it cannot be enforced.

SECTION VI.

Where the contract is in the nature of a penalty, or where the redemption is at the option of the borrower.

Where, by the terms of a contract, the party may by payment at a day certain avoid any stipulated penalty, such contract is not usurious. *Cullen* v. *How*, 8 *Mass.* 257.

In a contract for the purchase of property, the parties may stipulate for the damages to be paid, in case of failure, and the Court and jury will be bound by these damages thus ascertained, though they exceed the legal interest, on the value of the property, which ought to have been delivered. *Tardeveau* v. *Smith*, *Hardin*, 175.

Wherever the debtor, by the terms of the contract, can avoid the payment of a larger, by the payment of a smaller sum, at an earlier day, the contract is not usurious, but conditional, and the larger sum becomes the penalty. Where the holder of a bond, for the payment of a certain sum, promised to surrender the bond upon the payment of a less sum at an earlier day; to take advantage of such promise, there must be a strict compliance on the part of the obligor. To constitute usury, the obligation to pay more than the legal rate of interest must be absolute on the face of the transaction (i. e, not conditional, or upon a contingency). A contract, good in its creation, is not avoided by a subsequent usurious consideration, but such subsequent taint, will affect the after holder as against the endorser. *Moore* v. *Hilton*, 1 *Dev. Eq.* 429.

In a sale of public securities, where the defendant has his election to return them at a certain time, or to pay a certain sum for them, this is not usurious, nor is there any room for chantering as to the damages. In this case, however, the action was on a note, and the plaintiff gave a counter writing to receive the certificates in payment at a certain time. Defendant positively charged usury in the agreement. P. Dyer, Justice, *dissenting*, upon the ground that the averments were positive, and the facts should have been submitted to proof, but by the Court not allowed, and judgment for plaintiff. 1 *Root*, 393.

A sheriff having demanded payment of an execution in his hands against the defendant, which was nearly out, the defendant made his promissory note payable to the order of a third person, and by him endorsed in blank, and delivered it to the sheriff, contracting with him, that if the defendant should not pay the execution in ten days, it might be sold in market, or otherwise disposed of, and the avails applied in payment of the execution. After the expiration of the ten days, the execution remaining unpaid, the sheriff delivered the note in the state in which he received it to the plaintiffs, on their advancing to him a sum of money, less than the face of the note by more than the legal interest for the time the note had to run. *Held*, that the note, so received by the sheriff, was in security of the execution; that he had an interest in it, coupled with a power to sell, and that consequently it was an effective instrument in his hands, and not being

usurious in its original concoction, it did not become so by the subsequent sale to the plaintiffs. *Tuttle & Holt* v. *Clarke*, 4 *Conn.* 153.

J purchased of T a note which he held, made under the statute of 1818, reserving interest at twenty per cent. per month, from the time when due until paid, and gave his notes for it, both believing the high rate of interest recoverable. The notes given by J are not void for usury, though they embraced a part of the high rate in their consideration, and though the high rate was afterwards determined not to be recoverable: that for so much of the high rate of interest included in them there was no consideration, it being penal. *Thompson* v. *Jones*, 1 *Stewart*, 556.

A note for a sum certain, payable at a future day, which may be discharged by the payment of a less sum at an earlier day, is not usurious on its face, but is valid. *Jordan* v. *Lewis*, 2 *Stewart*, 426.

If A propose to B, that B should buy his land which was advertised to be sold under a deed of trust for the amount of the creditor's debt, and should let A have it again, upon payment of principal and interest, at the end of twelve months; instead of which they enter into an agreement, that B should bid the creditor's debt for the land, and if it was struck off to him, that he should resell it to A, sum thereafter to be agreed upon, provided it was paid within twelve months; which sum, though never agreed upon, was understood to be such as would reimburse B the money paid, the sacrifice he might make to obtain it, and liberally compensate him for his trouble, it is not usury; and if the money is not paid to B, &c., within the twelve months, nor the sum fixed, the purchase is absolute. *Jones* v. *Hubbard*, 5 *Call*, 211.

A judgment is recovered against a principal and surety. Upon an agreement, then, the surety signs the replevin bond, and the principal gives him a note, which includes the full amount of the replevin bond, *with about thirty per cent. added to it*, and the surety agrees in writing to credit the note with the same amount, provided the principal pays the replevin bond himself. They agree, in the pleadings, that the arrangement was intended not merely to have the effect of a penal bond, but as an indemnity to the surety, in case the payment of the replevin bond should devolve on him. *Held*, that this contract is but an agreement for a loan of money, in a certain contingency, at a future day, upon an agreement that more than six per cent. should be paid for the loan, and is usurious. The surety may enforce a judgment he has on the note, to the amount actually paid by him in discharge of the replevin bond, with legal interest from the time when he paid it. From

the balance the principal is relieved in equity. *Moore's Exec.* v. *Vance*, 3 *Dana*, 362.

Where the interest alone is put in hazard, but the principal is secured this does not exempt the agreement from the statute, with this exception, that if the exorbitant profit is reserved in the nature of a penalty to be paid upon some default, which the borrower may avoid by the payment of the principal, and so defeat the interest. This rule is thus laid down by Justice Dodridge: "If I receive both interest and principal, if it be at the will of the party who is to pay it, it is no usury: as, if I lend to one £100 for two years, to pay for the loan thereof £30, and if he pay the principal at the year's end he shall pay nothing for interest, this is not usury; for the party hath his election, and may pay it at the first year's end, and so discharge himself. *Croke James*, 509.

SECTION VII.

Where goods are advanced instead of money.

Where a party is compelled to take goods in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who sues on the bill. When a man goes to get a bill discounted, his object is to procure cash, not to encumber himself with goods. Therefore, if goods are forced upon him, there must be proof that they were estimated at a sum for which he could render them available upon a re-sale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them. *Ellenborough.*

But, upon a subsequent occasion, his lordship made a distinction between cases like that just mentioned, and a case where it appeared that, upon the discounter's offering to give goods in part, the person applying readily acceded to it, saying he thought he could make a profit by the transaction. Upon this evidence, his lordship observed, we must rather presume that the goods were charged beneath their true value; and it lies upon the person applying to prove the contrary, if he would impeach the discounter's title to the bill on the score of usury. *Coombe* v. *Miles*, 2 *Camp. N. P. C.* 553.

In all these cases it will be seen that the object with which the person taking the goods entered into the transaction, was the imme-

diate means of supplying his wants; and that the sale adopted was only colorable. They do not, therefore, apply to the sale of goods in the common course of trade, where no such object is professed, even though it should afterwards happen that the buyer disposes of them for a less sum than he gave. *Duke of Ancaster* v. *Pickett, cited* 1 *Brown's C. C.* 151.

Where M, being in embarrassed circumstances, and pressed with executions against him, applied to S for a loan of $800, and S refused the loan unless M would consent to purchase from him one hundred and twenty-four acres of wild land at $550, which was much above its real value, and M finally accepted this proposition, and gave S a bond and mortgage for $1350, payable in twelve equal annual instalments, with annual interest; *it was held,* that this loan was usurious. *Morgan* v. *Schermerhorn,* 1 *Paige,* 544.

In that case Chancellor Walworth said: If the defendant knew, or had reason to believe, he was getting more for his land than any one else would be willing to give him for it unconnected with a loan of money, he was in fact selling it for a price above its actual worth, whatever he might have considered its nominal value. From the answer in this case, no one can doubt that the necessities of the complainant induced him, for the sake of obtaining this loan, to give for this land a sum much beyond what it was actually worth to him. And the defendant by this device did in fact obtain more than seven per cent. advantage from the loan of his money. The statute cannot be evaded in this way, and no device of this kind can be permitted to avail the lender, without in effect repealing the laws against usury.

If on an application for a loan of money, the sale of shares in an insurance company, *at par,* is made a condition of the loan, when the shares are in fact below par, the transaction is usurious. *Eagleson* v. *Shotwell,* 1 *J. R. C.* 536.

Certain state stock, held by a banking association, was depreciated in the market, yet a party chose to take it at par, and gave his bond and mortgage for it at the par amount. *Held,* not to be an usurious transaction. *Willoughby* v. *Compstock,* 3 *Edw.* 424. *See case of Stribling* v. *Bank of Valley,* 5 *Randolph,* 132; *also* 7 *Leigh,* 26, *and Sibey* v *Morgan,* 3 *Leigh* 577; *under Virginia, Nos.* 20, 45, 51.

Where A passed over to B certain notes of a third person, as a part of the consideration for a usurious note made at the time by B payable to A; B, in case of his avoiding the usurious note on the ground of usury, cannot be compelled to restore the notes so given as part of the consideration. *Train* v. *Collins,* 2 *Pick.* 145.

If, on a loan of money, the lender imposes on the borrower, as a condition of the loan, property taken in part of the sum lent at a higher value than its worth, it is usury. *Stewart* v. *Mechanics' Bank, on appeal*, 19 *J. R.* 496. But where goods, or the notes of a bank, or of a third person, constitute part of the loan, and the value of the goods is uncertain, and the borrower of his own accord offers to take them at a certain price, or notes made by a person in credit at par, *it seems* that the loan is not usurious. *Ibid.*

A contract for the purchase of a slave at half price, and at the same time lending the vender another sum with condition, that if a larger sum than the purchase money and the loan with interest conjoined shall be received, the slave shall be restored, and the lent money considered as paid, is usurious. *Shanks* v. *Kennedy*, 1 *Marshall*, 65.

If, upon an application to borrow money, a contract for purchasing property at a low price is made, with the privilege of repurchase at a price enhanced beyond the legal interest, (the first purchaser incurring no real hazard,) it will be considered a device to evade the statute of usury. *Heytle* v. *Logan*, 1 *Marshall*, 529.

Where, upon an application for a loan of money, a party advances it upon property of much greater value being sold and delivered to him, the vender reserving the right to repurchase by refunding the money with interest in a given time, the transaction is treated by the courts as a loan upon security, and a mere device to evade the statute of usury. *Perkins* v. *Dye*, 3 *Dana*, 173.

A lends B $687, to be repaid on a certain day, with interest, and B, in consideration of the loan and forbearance, purchases of A sixteen shares of turnpike stock, for the sum of $400, when in truth the real price of the shares was $250, and gives his bond for the $687, together with the $400 for the stock; the sale of the stock being merely colorable, the transaction is usurious, and the bond void. *Rose* v. *Dickson*, 7 *J. R.* 196.

C covenanted to assign to a bank, bonds and mortgages on real estate to the amount of $13,000, payable in five years with interest semi-annually, and to guaranty the payment of them; in consideration whereof, the bank agreed to transfer to C certain stock to the amount of $6,500, at its nominal value, but which was then twenty-five per cent. below par, and to pay him the balance in money. Afterwards the bonds and mortgages not having been assigned, the bank transferred the stock and paid the money, on receiving two notes for $6,500, agreeing to take the bonds and mortgages in payment, if

delivered before the notes became due. *Held*, in an action upon one of the notes, that the transaction was usurious, and a verdict finding it otherwise was set aside. *Seymour et al* v. *Strong*, 4 *Hill*, 255.

Where, upon an application for the loan of money, it is by the agreement made a condition of the loan that the borrower shall receive from the lender uncurrent bills at a higher rate than their value in cash or current funds, the loan is usurious. *Cleaveland* v. *Loder*, 7 *Paige*, 557.

Aliter, where there is no agreement to make the loan in a depreciated currency, but the borrower at his own request, and for his own accommodation merely, receives payment of the loan in bills which are under par at the place where the loan is made. *Ib.*

Defendant applies to plaintiff to borrow money, who has none, but offers him a note for $700 on a third person, whom he understood to have cotton ready to pay it. Defendant accepts it, and gives his own note to plaintiff for $770, payable at the end of the year. *Held* usury. *Bunn* v. *Faussett*, 1 *Harp. R.* 81.

A tacit understanding between borrower and lender, formed on a known practice of the lender to lend money at a legal interest, if the borrower purchased of him a horse at an unreasonable price, is a shift to evade the statute against usury.

Where a Court of Chancery has doubts whether the sale of a house or other property is really intended as a shift to evade the statute against usury, it ought to direct an issue to be tried upon *viva voce* testimony, if to be had. *Douglass* v. *McChesney*, 2 *Randolph*, 109.

SECTION VIII.

Where stock is transferred.

Reserving, by means of collateral advantage, either by way of option or otherwise, more than the legal rate of interest, is within the statute. A party may lawfully lend stock as stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay it either in one way or the other. But he cannot legally reserve to himself the right to determine which it shall be. It is not illegal to reserve the dividends by way of interest for stock lent, although they may amount to more than the lawful rate of interest on the produce of it; for the price of stock may fall, and then the borrower would be a gainer; but the option must be made at the

time of the loan. If the produce of stock is lent, with an agreement that it shall be returned in money, and the dividends are in the mean time reserved by way of interest, that is usurious, if the dividends amount to more than the legal rate on the produce of the stock; and if the lender have the still further benefit of choosing, at a future time, whether the repayment should be made in stock or in money, is doubly usurious. But if it be *bona fide* a mere loan of stock to be replaced, it is lawful; for then, if the stocks fall, part of the principal is lost. But if no part of the principal is put in hazard, if the bond is given absolutely for repayment of the money at a certain day, and no option given the borrower as to repaying the money or replacing the stock, it is usurious, and no action can be founded on it.

The leading English cases on this subject are: *Moore* v. *Batie, Ambler* 371. *Tate* v. *Wellings*, 3 *Term. Rep.* 531. *Pike* v. *Ledwell*, 5 *Esp. N. P. C.* 164. *Maddock* v. *Rumball*, 8 *East Rep.* 304. *Barnard* v. *Young*, 17 *Vesey*, 44. *Doe & Davidson* v. *Barnard*, 1 *Esp. N. P. C.* 11 *East Rep.* 612. *Smedley, qui tam* v. *Roberts et al*, 2 *Camp.* 607.

Circumstances, though subsequent to the bargain, throw back a strong light upon its true character, and are proper evidence of what has been its real object. In such transactions, there are all the features which are deemed indicative of usury. Positive proof is rarely to be expected, and hence the courts have always rested upon circumstantial evidence. Thus, when the bargain originates in a loan (1 Call. 81); where the seller is an habitual usurer (2 Rend. 112); where the buyer of an article is in distress, and the price greatly inadequate (Gilmer, 86); where the party is needy and already in the power of the lender; where the hazard is slight, and the disproportion of price so great as to afford evidence of corrupt intention; suspicion is very reasonably converted into conviction of the illegality of the transaction. It would indeed be very absurd if the mere form of a stock transaction should be a sufficient veil for an unlawful loan.

There is no doubt that any person, natural or corporate, may dispose of stock or any other property at a high price on time, without being subject to the penalties of usury, unless the sale be indissolubly connected with a loan, and a mere shift to evade the statute. The circumstance of the borrower's first applying for a loan of money, and being refused before he agrees to purchase at exorbitant prices what he does not in reality want, was formerly a strong circumstance in determining a transfer of stock to be indissolubly connected with, or substantially a loan of money at usurious interest; but the usurer gets

rid of this evidence by sending out street brokers, to find out needy borrowers, and direct them where to apply for stock, and what kind, as a purchase; and have prepared their own evidence that the purchaser applied for the identical stock sold, and not for a loan of money.

A lends B $687, to be repaid on a certain day, with interest, and B, in consideration of the loan and forbearance, purchases of A sixteen shares of turnpike stock, for the sum of $400, when, in truth, the real price of the shares was $250, and gives his bond for the $687, together with the $400 for the stock; the sale of the stock being merely colorable, the transaction is usurious and the bond void. *Rose* v. *Dickson*, 7 *J. R.* 196.

Where the money loaned was secured by a transfer of stocks, and it was made a condition of the loan that the lender should have the option to return the stocks with the dividends at the market value of the stock at the time of making the loan, or to receive back his money with interest thereon at the time appointed for its payment. *Held*, that the stipulation for a contingent benefit to the lender beyond the legal interest, in an anticipated rise in the value of the stock, rendered the contract usurious. *Cleveland* v. *Loder*, 7 *Paige*, 557.

A contract by which a borrower agreed to pay interest to lender on bank stock received by him at a certain price, when the stock was worth less in the market, is usurious. *Astor* v. *Price et al*, 7 *L. New Series*, 409.

It is not usury to sell bank stock at a very high price, since, to constitute usury, there must be a treaty for the loan or forbearance of money. 4 *Hen. & Mumf.* 490.

A debtor, owing a certain number of shares of bank stock, agrees with his creditor to pay him, at a future day, the market price of the stock on that day, or $150 per share, at the creditor's option, with the dividends. *Held*, the contract is usurious. *Smith* v. *Nichols*, 8 *Leigh*, 330.

SECTION IX.

Where something besides interest, paid as such, is to be allowed for the loan.

It signifies not in what shape the profit upon the money lent is to accrue; it is sufficient that such profit should exceed the legal rate, in order to bring the transaction within the statute.

That where money is loaned, and a slave is taken as security for its repayment, on a contract that the use of the slave shall go in discharge of the interest, if the value of the services of the slave greatly exceeds the legal rate of interest, the contract is usurious and void. *Hemer* v. *Harrall*, 2 *Stew. & Port.* 323.

If one borrow money, and agree that the lender shall have the use of a tract of land for the interest of the money, the value of which exceeds the interest, equity will set off the excess against the amount of money borrowed. 4 *Hay.* 204.

If one lend money, and take a mortgage upon a negro as security, and contract to have for the interest of the money the use of the negro, which greatly exceeds the legal interest, the contract is usurious. *Richardson's Adm'rs* v. *Brown*, 3 *Bibb*, 207.

A covenant to pay $150 in negroes, in six months, for the sum of $100, is usurious. 1 *Bibb*, 333.

H loaned $250 to M, to be paid in one year. H, who was to have instead of interest the use of a negro whose hire greatly exceeded the interest, took from M an absolute bill of sale of the negro, but gave M a writing, specifying, that if he returned the money in one year, he might redeem the negro. H kept the negro several years. The contract was usurious. H shall account for the hire of the slave, to be set off against the money loaned, and interest. *M'Gennes* v. *Hart*, 4 *Bibb*, 327.

Usury may be by the reservation of interest, as rent on a lease made by the lessor to the lessee; so intending to get interest, at an unreasonable rent, or by obtaining a beneficial lease at an inadequate rent. (*See under Kentucky*, 44.)

A party hired two slaves, at $150 for a year, and afterwards obtained a bill of sale of them, to secure a debt of the owner, which had been assigned to him; when the year was half out, having to provide for another debt which he owed, the assigner obtained $200 of the hirer, $100 by giving up the note for $150, and $100 for the hire for another year. Held, that this must be deemed one of many usurious transactions that occurred between the parties; and upon the redemption of the slaves the hirer must account for their hire at a reasonable rate, credited by the payments made. *Woodward* v. *Fitzpatrick*, 9 *Dana*, 121.

An incorporated banking company loaned a sum of money at six per cent. discount, with an agreement, on the part of the borrower, to *redeem* the identical bank notes received by him on the loan, if they should be returned to the bank during the continuance of the loan,

with specie; and also to purchase of the company with specie, during the loan, a certain amount of other bank notes not current, at par. This was held to be a lawful agreement, and the note given to secure the loan not usurious. *Northampton Bank* v. *Allen*, 10 *Mass.* 284.

A mortgage taken on the loan of $700, to be paid in ten years with interest, (the interest not to be paid until the expiration of the ten years,) is not usurious, though the loan be made upon an agreement that the mortgagee, in addition to the interest reserved, shall have, free of rent, the use and occupation of an acre of the mortgaged premises worth eight dollars per year; the whole compensation for the loan, not being equal to a reservation of compound interest. *Fox* v. *Lipe*, 24 *Wend.* 164.

When a note is discounted at a bank, at the rate of seven per cent. per annum, for the time such note has to run, under an agreement between the borrower and the officers of the bank, that he shall receive the money lent in the bills of such bank, and will at his own expense cause such bills to be kept in circulation until his note becomes due and payable, the agreement for such loan is usurious and void, by the usury laws of this state. *Pratt* v. *Adams*, 7 *Paige*, 615.

If the services of a slave, given for the use of money, exceed in value the highest rate of conventional interest, the contract is usurious. *Galloway* v. *Logan*, 4 *Lou. N. S.* 167.

A transaction entered into in New York, and to be executed there, by which A and B exchange their notes, bearing interest at six per cent. and in consideration thereof, B engages to insure a certain number of lives with A, at the usual rates, and also send his annual crop of sugar to A, to be sold on the usual commissions, is usurious and void, by the laws of New York. *Claque et al* v. *their creditors*, 2 *Lou. R.* 115.

Defendant being sued on a mortgage, for a certain sum with interest, may plead that, in addition to the interest, the plaintiff had received the services of the slave mortgaged, so that the contract was usurious, and may demand, in compensation, the value of the services, as an offset, both against principal and interest. *Rains* v. *Kemp*, 4 *Lou. R.* 319.

A stipulation to repay the principal in money, is not necessary to constitute a loan; it is enough if the principal is secured and not *bona fide* put in hazard, and it matters not what the nature of the security is, if it is sufficient; as if a man borrow £20, to pay £10 for interest for one year, and pawns goods to the lender, of the value of £100, on a stipulation in writing, by the lender, to return the goods on pay-

ment by the borrower of £30, with interest thereon. This is an usurious lending, though there is no undertaking by the borrower, to repay the principal. *Per Buchanan, Justice, in Tyson* v. *Richards*, 3 *Harris & Johnson*, 112.

A loaned B $800, and as security takes an absolute deed of a piece of land of much greater value than the sum loaned, under a parol agreement, that B may redeem the land upon repayment of the loan *with interest at twelve per cent. per annum*, and that B shall hold possession of the land, and pay to A $48 per annum for the rent. B afterwards executes to A, his promissory note for the simple interest of the money loaned, under the name of rent. *Held*, that such transaction is usurious, and the note void. *Michell* v. *Preston*, 5 *Day*, 100.

Where something besides interest, as such, is allowed on a loan and forbearance of money, it is a question of fact for the jury, whether the contract is fairly and honestly made, or whether it is a cover for usury. *Stevens* v. *Davis*, 3 *Metcalf*, 211.

Where A contracted for land, and placed one-third of the purchase money in the hands of B, who completed the purchase and then leased the land to A, at the rate of twelve and a half per cent. upon the sum advanced by him, and gave a bond to A, to convey to him at the expiration of the term upon the payment of the advance and rent, and A was embarrassed, and made permanent improvements; it was held, that the arrangement was a mortgage to secure a usurious loan. *Thorp* v. *Ruks*, 1 *Dev. & Bat. Eq.* 613.

An agreement to set the profits of a mortgaged subject against the interest of the money lent, is usurious, if they exceed the legal rate of interest. *Robertson* v. *Wheeler*, 2 *Calls*, 421, 2 *ed.* 354.

An obligation to pay S C $300 one day after date with legal interest from the date. I also agree to let said S C have the field of mine she now occupies, until $100 of the above money is paid. The rent was worth more than the legal interest. This was a device to cover usury. *Whally* v. *Crutegner*, 6 *Monroe*, 158.

An advance of money to an applicant for a loan, and his obligation taken to deliver slaves of a certain description, in a certain time, worth more than the money and legal interest, held to be usurious. *Lindsey* v. *Sharp*, 7 *Monroe*, 248.

In all such cases, therefore, it is a mere question of fact for the jury, whether the contract was made fairly and honestly, or whether it was intended merely as a cloak for usury. See Saunders's case, decided usurious, *Shep. Touchstone*, 62; *Le Blanc* v. *Harrison*, *Holt's*

Rep. 706, where the jury found for the plaintiff, but Lord Holt thought the verdict wrong.

Also in *Bedo* v. *Sanderson*, *Croke James*, 440, the jury found for the plaintiff.

But in *Seall qui tam* v. *Brent*, 2 *Term R.* 238, and in *Wright* v. *Wheeler*, 1 *Camp.* 165, *note*, no doubt existed as to the corruption.

SECTION X

Where any extra sum is to be allowed for brokerage.

A lender is not allowed to make it the *condition* of the loan, that he shall receive a compensation for his services in procuring the money, as the allowing of such a demand would tend to usury and oppression, if it be not usury in itself. *Hine* v. *Handy*, 1 *J. C. R.* 6.

The charge of a *commission* of a *half per cent.* by a stock and exchange broker, in addition to the lawful interest on advances made on a deposit of stocks, as a compensation for transacting the business, is not usurious. *Nourse* v. *Prime*, 7 *J. C. R.* 69.

M requested J to procure a loan of money for the former, stipulating to pay J three per cent. per month. J accordingly borrowed the money of W. M gave his promissory note with an endorser. M paid J the three per cent. for his sole benefit. *Held*, that the note was not usurious. *Coster* v. *Dilworth*, 8 *Cow.* 299.

Where a person applied to another to assist him in obtaining the loan of $400, and promised to give him $28 for procuring the loan, investigating the title and drawing the bond and mortgage therefor, and putting them on record, and the latter applied to his own father for a loan of the money for a year, at seven per cent., and agreed that the title should be investigated and the securities made and put upon record without expense to him, and the father consented to make the loan without knowing that his son was to receive any compensation from the borrower, for obtaining the money. *Held*, that the loan was not usurious, although the son when he took the bond and mortgage for the loan in the name of his father, included therein for his own benefit the $28 which the lender had agreed to give him for his services. *Crane* v. *Hubbell*, 7 *Paige*, 413.

In *Harris* v. *Boston*, 2 Camp. 348, Lord Ellenborough said, It will first be a question of fact whether the commission of two and a half *per cent.* exceeds what can be fairly and reasonably referred to the

plaintiff's trouble and risk, in making these purchases. If it does, then, by an inference of law, it must be ascribed to the advance and forbearance of the money, and the contract is usurious. If the plaintiffs would have duly made the purchases for one *per cent.*, but charge £2 10s. besides legal interest, *where they advance the money*, this commission must be considered as an expedient for enhancing the rate of interest beyond £5 *per cent.*, and is a mere color for usury.

In *Palmer* v. *Baker*, 1 *Maule & Selwin*, it was said, that the court has no scales nice enough to balance the trouble imposed upon the party; and without some proof to the contrary, the compensation must be taken to be a fair one. All commissions where a loan of money exists, must be ascribed to, and considered as, an excess beyond legal interest; unless as far as it is ascribable to trouble and expense *bona fide* incurred, in the course of the business transacted by the persons to whom such commission is paid; but whether any thing, and how much, is justly ascribable to this latter account, is always a question for the jury. *See Carstairs* v. *Steen*, 4 *Maule & Selwyn*, 192.

Where A receives B's note, on giving B his note at *ten* days, for the purpose of raising money on B's note, and pays B *two and a half per cent.* commission, this is a usurious loan, within the meaning of the statute. *Dunham* v. *Dey*, 13 *J. R.* 40. *S. C. in Error*, 16 *J. R.* 367. For it is a mere shift or contrivance to evade the statute. *Ibid.* Evidence of usage of trade to take a commission on such exchange of paper, is inadmissible, as usage cannot prevail when the transaction comes within the statute. *Ibid. S. C.* 16, *J. R.* 367.

It seems that a person may lawfully receive a commission for becoming security for another. *Ibid.*

The plaintiffs, who were in the practice of receiving *produce* for the defendant, a country merchant, and freighting the same to the city of *New York*, and accepting his drafts under an engagement that the produce was to be in their warehouse, at or before the time the drafts became payable, charged a *commission of two and a half per cent.* on all advances made by them, to meet the payment of the drafts, where the defendants had no funds in their hands, and also the *interest* from the time the different items of their account became due: *Held*, that the *commissions* in this case were not usurious, or a cover for a usurious transaction; but a customary allowance for the trouble and inconvenience of transacting the business. *Trotter & others* v. *Curtiss*, 19 *J. R.* 160.

Where the defendant advanced his notes to the plaintiff for the plaintiff's notes for the same sums, payable at or near the same peri-

ods, for which exchange of notes the defendant received a commission of two and a half per cent. on the amount; and the notes when they became due were renewed, and new notes given in exchange; and this renewal and exchange were many times repeated, and the defendant on each renewal and exchange received a commission of two and a half per cent., but which was less than the lawful interest on the amount of the notes, for each time they had to run: *Held*, that the trasaction was not usurious, it being a compensation only for a loan of credit and risk. *Dey* v. *Dunham*, 2 *J. C. R.* 182.

But where D lent F his promissory notes, and received the notes of F for the same amount, in exchange, and also a commission of two and a half per cent., which exceeded the legal interest for the time the notes had to run: *Held*, that the transaction was usurious, and the notes and other securities given by F void. *Fanning* v. *Dunham*, 5 *J. C. R.* 122, [*and see Dunham* v. *Gould in error*, 16 *J. R.* 367.]

The charge of a *commission* of a *half per cent.* by a stock and exchange broker, in addition to the lawful interest, on advances made on a deposit of stocks, as a compensation for transacting the business, is not usurious. *Nourse* v. *Prime*, 7 *J. C. R.* 69.

M requested J to procure a loan of money for the former, stipulating to pay J three per cent. per month. J accordingly borrowed the money of W. M gave his promissory note with an endorser. M paid J the three per cent. for his sole benefit. *Held*, that the note was not usurious. *Foster* v. *Dilworth* 8, *Cow.* 299.

Where goods fraudulently obtained are deposited with an auctioneer, who makes an advance upon them, and charges five per cent. besides the usual commissions, the transaction is usurious; and for that cause the auctioneer is not entitled to be considered a *bona fide* purchaser, in an action of trover brought against him by the party from whom the goods were obtained, although he is wholly innocent of the fraud. *Ramsdell & Brown* v. *Morgan*, 16 *Wend.* 574.

Where the holder of a note payable to himself, requested another person to procure the note to be discounted, who by placing his name upon it as an endorser procured it to be done, received the avails and paid over the same, except the sum of thirty dollars, which he retained for his endorsement and trouble in the matter; it was held, that the transaction was usurious, and that the usury might be alleged in bar of a recovery of a subsequently substituted note. *Steele* v. *Whipple*, 21 *Wend.* 103.

S, a commission merchant in the city of New York, agreed to accept drafts of N to the amount of $20,000, taking a bond and mort-

gage from him for twice that sum, as security; and it was further agreed that all produce shipped to New York by N, should be sent to S, for sale on commission; that the latter should thus be kept in funds to meet his acceptances as they became due, and that he should be entitled to two and a half per cent. commission on all advances or acceptances met otherwise than with produce. N's drafts were afterwards accepted and paid by S to an amount exceeding the value of the produce consigned, and he charged N with interest on all sums thus paid, together with two and a half per cent. commissions on acceptances not met with produce. *Held*, in an action by S to recover the sum advanced upon one of the drafts, that the transaction was not necessarily usurious; especially as it appeared that the charge for commissions was customary among merchants engaged in similar business. *Cwen J. dissenting*, whose opinion on usurious loans of credit, see in *Suydam* v. *Westfall*, 4 *Hill*, 211.

The *bona fide* sale of one's credit by way of guaranty or endorsement, though for a compensation exceeding the lawful rate of interest, is not usurious, if the transaction be unconnected with a loan between the parties. *Ketchum* v. *Barker*, 4 *Hill*, 224.

M, being desirous of raising money by a note at four months drawn by himself and endorsed for his accommodation by B and L, authorized a broker to buy an additional name, or guaranty, for the purpose of getting the note discounted. Application was accordingly made to K, also a broker, who endorsed the note on receiving a commission of two and a half per cent., and it was then discounted at a bank. About the time it fell due, M made another note, corresponding in amount, which, after being endorsed, was discounted by K, and the proceeds applied in payment of the first. The second note not being met at maturity, K brought an action upon it against the makers and endorsers, which was referred, and the referee reported in K's favour. *Held*, on motion to set aside the report, that the taking of the commission by K did not render the transaction *per se* usurious, and the motion was therefore denied. *Ibid. Cowen dissenting*, holding that the transaction between K and M, in respect to the first note, was not a *sale*, in any sense, but amounted to a usurious loan of K's credit; and the note in question having come to his hands by way of further security on extension of the loan, was void. Various English and American cases reviewed.

Where a person applied to another to assist him in obtaining the loan of $400, and promised to give him $28 for procuring the loan, investigating the title, and drawing the bond and mortgage therefor,

and putting them on record; and the latter applied to his own father for a loan of the money for a year at seven per cent., and agreed that the title should be investigated and the securities made and put upon record without expense to him, and the father consented to make the loan without knowing that his son was to receive any compensation from the borrower for obtaining the money: *Held*, that the loan was not usurious, although the son when he took the bond and mortgage for the loan in the name of his father, included therein for his own benefit the $28, which the lender had agreed to give him for his services. *Crane* v. *Hubbell*, 7 *Paige*, 413.

To take a compensation exceeding the lawful rate of interest for obtaining money at a bank, on one's own security for the use of another, is not usury. If such compensation be unreasonable and extravagant, though it will not necessarily contaminate the contract with usury, yet it may furnish evidence of an intent in this way to cover an usurious loan, and whether the transaction is in its nature and design a compensation for time, trouble, and expense, or a cover for usury, is a question of fact to be submitted to the jury. *Hutchinson* v. *Henner*, 2 *Conn.* 341.

Where it was agreed between A, a commission merchant in New York, and B, a country trader, that on being furnished with a letter of indemnity, A would become responsible to a limited amount and charge for lending his name; if put in funds in time to meet the payment, half a per cent., and two and a half per cent. in all cases of advance; and it appeared that the latter charge was intended by the parties as a fair compensation to A for his trouble in providing for acceptances, which it was the duty of B to pay, and not as a cover for a usurious loan; it was held, that the commissions charged under such agreement were not usurious—on jury finding. *Defaut et al* v. *Strong*, 8 *Conn.* 513.

A owes B $5,000, and when it becomes due, it is agreed that A shall endorse notes on different individuals, not yet due to B, in payment thereof, and deduct four per cent. a month for the time the notes had to run; and also procure another endorser, which was accordingly done. *Held*, that this transaction was usurious, and that the subsequent endorser could take advantage of it. *Martin & Yerger*, 392. 1 *Yerger*, 248, 444.

J B, being indebted to certain British merchants, conveyed a tract of land and sundry slaves in trust to secure the payment of the debt in three equal annual instalments, with interest from the date of the deed of trust; the payment to be made in tobacco, to be delivered at,

and addressed to them in London, on which they were to draw the usual accustomed mercantile commission of twenty-one shillings sterling for each hogshead actually shipped. And it was further provided that in case of *non*-shipment of the tobacco, *a further sum equivalent to, and in lieu of, the usual accustomed mercantile commission thereon*, at the rate of twenty-one shillings sterling per hogshead, estimating each hogshead to be worth £10 sterling, was to be added to each payment. *Held*, that the transaction was usurious, and the deed of trust void. *Dunbar* v. *Long*, 4 *Hen. & Mun.* 212.

F and N being indebted to the bank, and the bank having recovered judgment against them for the debts, and the debtors applying to the bank for indulgence, the bank agrees to give them a long indulgence, upon their agreeing to give real security for the debt, and moreover to pay the attorney of the bank all the costs of the suits, and the *commission* which the bank had agreed to give him for collecting and securing the debt. The debtors give the real security for the debt, and one of them pays the *costs* and part of the *commission* of the attorney, and his executor gives the attorney his note for the balance of the commissions; the attorney having full notice of the terms of the agreement between the bank and the debtors. *Held*, the agreement between the bank and the debtors, and therefore the note for the commissions to the attorney, were usurious. Decree between co-defendants refused under the circumstances. *Toole* v. *Stephen*, 4 *Leigh*, 581.

A debtor owing a debt due, agrees to give the creditor his bond for it, payable at a future day, and to add to the debt, and insert in the bond a sum equal to five per cent. on the debt to cover commission, which the creditor might be compelled to pay an agent for collection; and the bond is given accordingly for the aggregate, including the commission, with a verbal agreement, that if the debtor should pay the debt punctually, he should be exempted from the payment of the sum inserted in the bond for commission for collection. In debt on the bond and issue joined on the plea of usury. *Held*, 1. Parol evidence is admissible to prove the verbal agreement as to the sum allowed for commission. 2. The contract is not usurious, since the debtor might, by punctual payment of the debt, relieve himself from the payment of the sum he contracted for commission. 3. The creditor stipulating that the debtor should pay the commission which would be incurred in the collection, in default of punctual payment, if made in good faith to cover such commission, and not as a device to evade the statute of usury, was in point of law not usurious; and the

Court ought so to direct the jury, leaving the jury the question of fact, whether the contract for commission was made in good faith, or was an evasion of the statute. *Campbell* v. *Shields*, 6 *Leigh*, 517.

Custom or usage will not be received to sanction usury. 2 *Cow.* 712.

S. P. as to usury, customs, discount, &c. *Bank of Utica* v. *Smalley*, 2 *Cow.* 770.

M requested J to procure a loan of money for the former, stipulating to pay J three per cent. per month. J accordingly borrowed the money of W. M gave his promissory note with an endorser. M paid J the three per cent. for his sole benefit. *Held*, that the note was not usurious. *Coster* v. *Dilworth*, 8 *Cow.* 299.

A mortgage made to an Insurance Company is not void for usury, on the ground that under a covenant allowing the mortgagees to insure, they caused such insurance to be effected in their own office, and charged the premium. (*The case of the Utica Insurance Company* v. *Caldwell*, 3 *Wend.* 296, containing the same doctrine approved.) *New York Fire Insurance Company* v. *Donaldson*, 3 *Edw.* 199.

A contract by which ten per centum interest is taken for money and two and a half per cent. commissions for advancing it, is usurious, and the lender can consequently only recover the principal. *Daquin et al* v. *Cairon*, 3 *L. R.* 393.

SECTION XI.

For discounting and negotiating bills and notes.

Commissions may be lawfully claimed upon four different transactions where bills of exchange or promissory notes are concerned. These are, first, in the discounting; secondly, in the acceptance; thirdly, in the remittance; and fourthly, in the return of a foreign bill by a party when it is protested for non-acceptance, or non-payment. *Comyn*, 123.

The mere act of discounting bills of exchange at the rate of £5 *per cent.*, and thus instantly receiving the interest, is not, as we have before seen, an act of usury. *Ibid.* *Massa* v. *Dawling*, *Strang*, 1243. 7 *Mad.* 353. 2 *Term. R.* 52. *Peak N. P. C.* 200.

Where a party takes £5 *per cent.* discount, *as for ready money*, and yet does not pay ready money, but bills payable at a future day, though both parties consent to this transaction, and though it may be for the convenience of both, I am clear that it is usury. *Lord Kenyon*,

1 *Bos. & Pul.* 153, *note* A. *Maddock* v. *Hammett*, 7 *Term R.* 185. 1 *Bos. & P.* 144. 4 *Taunt.* 810. 1 *East Report*, 92. 3 *Wills.* 59. 1 *Camp.* 445–450. 1 *Taunt.* 511.

A commission may be taken by a banker, not only for discounting, but also for accepting and paying bills for a correspondent out of funds furnished by the latter; when the banker must necessarily incur the expense of counting-house, clerk, &c., for transacting such business. A commission of £5 *per cent.* may therefore be lawfully taken by a London banker, who is furnished by his correspondent with funds to pay bills previously to their becoming due. For here, as there is no contemplation of an advance of money either as a loan or for forbearance, there can be no usury. And even if, on such an agreement, an advance of money were contemplated, it would be a question for a jury to ascertain whether the commission was a shift to obtain more than legal interest, or a compensation for the trouble and expense incurred in accepting and paying the bills. *Masterman* v. *Cowrie*, 3 *Campbell*, 488. *Calliot* v. *Walker*, 2 *Anstruth*, 495. *Kent* v. *Lowen*, 1 *Camp.* 178. 4 *East*, 55.

A reasonable commission beyond legal interest, for extra incidental expenses or charges, as for agency in the remittance of bills for acceptance and payment, is not usurious. *Baynes* v. *Fry*, 15 *Vesey*, 120.

When a bill endorsed over is not duly paid, the endorsee may charge the endorser with interest, exchange, and other incidental expenses beyond the amount of legal interest. *Auriel* v. *Thomas*, 2 *Term Rep.* 52. 4 *Maule & Selwyn*, 192. 11 *East Rep.* 43. 3 *Camp.* 488. *Madd. Chan. Rep.* 112. 3 *Bos. & Pul.* 154.

Discount.

The rule is this: Taking interest in advance is allowed for the benefit of trade, though it exceed the legal rate of interest. The instrument thus discounted must be such as will, and usually does circulate in the course of trade, viz, a negotiable instrument, and payable at no very distant day. Under this restriction, taking interest in advance, either by a bank or incorporated company without banking powers, or an individual, is not usurious. *The New-York Firemen's Insurance Company* v. *Ely & Parsons*, 2 *Cow.* 678.

Taking the interest in advance on discounting a note is not usury, though it was formerly *held* otherwise. *Bank of Utica* v. *Wager*, 2 *Cow.* 712.

But *it seems* this is confined to bankers, and those who deal in commercial paper by way of trade. *Ibid.*

The cases upon the last two points considered. *Ibid.*

Discounting a note at seven per cent., and taking the interest in advance, is not usury, either in bankers or others. *New-York Firemen's Insurance Company* v. *Sturges*, 2 *Cow.* 664. 3 *Wendell*, 408.

A note endorsed for the accommodation of the maker, and passed by him as security for a usurious loan, is a usurious contract in its inception, as the lender is, in fact, to be considered the first holder of the note. *Jones* v. *Hake*, 2 *J. C.* 60. *Wilkie* v. *Roosevelt*, 3 *J. C.* 66, 206.

It seems that the practice of banks issuing *post notes* is not usurious. *Dunham* v. *Dey*, 16 *J. R.* 367.

Interest calculated and received upon a note, upon the principle of three hundred and sixty days being a year, is *prima facie* usurious, and renders the note void. *Utica Insurance Company* v. *Tillman*, 1 *Wend.* 555.

Where A and B exchange notes for the purpose of raising money, and A obtains the note of B to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery, in an action by the purchaser of the note against B, the maker. *Rice* v. *Mather*, 3 *Wend.* 62.

Discounting a *business note* at more than seven per cent. interest, is not a usurious transaction; a note valid in its inception may be bought and sold as a chattel, at its value, real or supposed. *Kent* v. *Walton*, 7 *Wend.* 256.

Where an acceptance is given in consideration of a promise that the party obtaining the acceptance will, at a specified period, deliver to the accepter a quantity of country produce, the acceptor cannot avail himself of the defence of usury, if the acceptance be, subsequently and before maturity, negotiated by the holder at a usurious rate of interest. *Cameron* v. *Campbell*, 24 *Wend.* 94.

The giving of a certificate of deposite payable at a future day does not render a bill of exchange, discounted by a bank, void for usury, where the certificate was granted at the request and for the accommodation of the party obtaining the discount, and there is no intent to take usury. *Knox* v. *Good*, 25 *Wend.* 643.

The Court held, that merely discounting the interest on a note at the time of receiving it, is not of itself conclusive evidence of usury. It might be evidence of a design to evade the statute, but that was a question for the jury. *Lyman* v. *Moore*, 1 *Pick.* 295.

Although it may be usury in an individual to take interest in advance upon a loan, it is not so in a bank discounting a negotiable security, even if payable directly to the bank, because such a course is sanctioned by legislative and judicial determinations, and by the general understanding of the community. *State Bank* v. *Hunter*, 1 *Dev.* 100.

Deducting interest by a bank for the days of grace upon discounting a bond, (which it seems is discountable in N. C.,) is not usurious, although the obligor is not entitled to the days of grace; the parties supposing that on such an instrument he *was* entitled. *Ibid.*

A promissory note, payable at a future day, given for a *bona fide* business transaction, and which note was not made for the purpose of raising money in the market, was sold by the drawer and endorser for a sum so much less on its face as exhibited a discount beyond the legal rate of interest, no stipulation having been made against the liability of the endorser, is not *per se* an usurious contract between the endorsee and the endorser, and an action can be maintained upon the note against the endorser who sold the same, by the purchaser.

Per Curriam, Justice Johnson.—By leaving the possession of the note in the endorsee who has no cause of action, and the cause of action, if anywhere, in the endorser who has parted with the possession of the note, it virtually discharges the promissor from liability, although his contract, in its inception, may have been wholly unimpeachable. Yet the rule of law is everywhere acknowledged, that a contract free from usury in its inception, shall not be invalidated by any subsequent usurious transactions upon it. The Courts of New-York get over these difficulties by adjudicating that whenever a note or bill in its inception was a real transaction, so that the payee or promissee might at maturity maintain a suit upon it, a transfer by endorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so where the paper in its origin was only a nominal transaction. 2 *Johnson's Cases*, 60. 3 *Johnson's Cases*, 66. 15 *John. R.* 44. That a contract free from usurious taint in its inception is not to be invalidated by any subsequent transaction, since, as has been shown, by converting a sale on a discount into a loan on usury, and thus rendering null and void the act of endorsing it, a contract wholly innocent in its origin, and binding and valid upon every legal principle, is rendered at least valueless in the hands of the otherwise legal holder; and a party to whom the provisions of the act against usury could never have been intended to extend, would be discharged of a debt which he justly owes to some one.

Nichols was first endorsee, and defendants the only endorsers, and the transaction of transfer direct from defendant to plaintiff. *Nichols* v. *Fearson et al*, 7 *Peters*, 103. *See case of Cram* v. *Hendricks*, 7 *Wendell*, 569.

The sum which the endorsee in such case is entitled to recover of the endorser, is the amount of the advance made by him, together with the interest thereof; such, under the settled law of the land, being the extent of the obligation of the endorser in such case. In an action against the maker, the endorser is entitled to the whole amount of the note.

Where a bill or note is valid between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee who has discounted it at a higher rate than the legal interest, and he may recover the full amount of the note against the maker or acceptor. *Munn* v. *The Commission Company*, 15 *J. R.* 44. *See case of Mazuzan* v. *Mead*, 21 *Wendell*, 285.

Where a usurious loan is made, and promissory notes pledged as security for the repayment of the money, an action upon the notes cannot be maintained by the lender against the borrower. *Bell* v. *Lent*, 24 *Wendell*, 230.

Nor can an action be maintained by a third person, who has received the notes from the holder under an agreement to collect them and apply the proceeds towards payment of a debt due to him from the lender. *Ibid.*

Where the purchase of a negotiable note at a greater discount than legal interest, from a person who was supposed to be the legal holder and owner thereof, but who was in fact the mere agent of the drawer, rendered the note void for usury in the hands of the purchaser, or whether such purchaser was protected to the extent of the money actually paid for the note, under the provisions of the Revised Statutes relative to usury—Quere. *Mitchell* v. *Oakley*, 7 *Paige*, 68.

T P executed a bond and mortgage to the G. I. Company for $10,000. They pressed a foreclosure, and had obtained a decree. T P got S K to advance $8,000, and paid the balance himself to the Company. The bond and mortgage and decree were assigned by the G. I. Company to S K, and the latter (S K) afterwards pressed a sale under the decree for the whole $10,000 and interest. The Court *held*, that S K could only have a sale for $8,000 and interest. *Pearsall* v. *Kingsland*, 3 *Edw.* 195.

If the parties whose names are on a note made to raise money, and

discounted at a higher rate than the legal interest, could not, as between themselves, maintain an action on it when it became payable, if it had not been discounted, the transaction is usurious and the note void. *Powell* v. *Waters*, 17 *J. R.* 176.

A note made payable to A, or bearer, but never delivered to A, but passed by the maker to H, as a security for a usurious loan, is usurious and illegal in its inception. *Marvin* v. *McCullum*, 20 *J. R.* 288.

Where A and B exchanged notes for the purpose of raising money, and A obtains the note of B to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B the maker. *Rice* v. *Mather*, 3 *Wend.* 62.

Discounting a *business note* at more than seven per cent. interest, is not a usurious transaction; a note valid in its inception may be bought and sold as a chattel, at its value, real or supposed. *Kent* v. *Walton*, 7 *Wend.* 256.

Nor is it usurious in selling a note, payable at a future day, to take a note for the principal and interest of the note sold, computed to the day of sale, without making a rebate of interest. *Marvin* v. *Fester*, 8 *Wend.* 533.

In an action by the endorsee of a promissory note against the maker, usury may be set up as a defence, unless it be shown that the plaintiff is an innocent holder for a valuable consideration, and became possessed of the note before maturity. *Hackley* v. *Sprague*, 10 *Wend.* 113.

A bond and mortgage for $3000, payable one year from date, with interest, to become due half yearly, and on which over five months interest had already accrued, were assigned absolutely by the holder for $2600, in order to raise money. The assignment stated the consideration paid by the assignee to be $3000, and contained a covenant that thus much was due and owing on the bond and mortgage. At the time of executing the assignment, the assignor also executed to the assignee a bond with surety conditioned that the mortgagor should pay the $3000, together with interest, by the day appointed for that purpose, in the securities assigned. On a bill filed by the assignor to set aside the assignment and have the bond of guaranty cancelled; *held*, that the transaction was on its face a mere sale of a chose in action unconnected with a loan, and therefore not usurious *per se*. *Rapelje* v. *Anderson*, 4 *Hill*, 472.

A is indebted to B. A loans money at usurious interest to C. B, not knowing of the usury, agreed to receive the note of C (well

endorsed) in payment of his debt from A, and C executes his note, which is endorsed and delivered to B. *Held*, that the note was usurious and void in the hands of B. 2 *Yerger*, 350.

A transfer by endorsement of a note, for a usurious consideration, is neither void or voidable; it is an executed contract. *Knight* v. *Putnam*, 3 *Pick.* 184.

Usury, between the endorser and endorsee, in the transfer of a negotiable note, only affects the promise of the endorser, and cannot be set up in defence in an action by the endorsee against the maker; consequently, the endorser cannot be admitted as a witness to prove such usury. *Ibid.*

If a note, made for the purpose of raising money, is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, maintain a suit on the note, when it becomes mature, provided it had not been discounted, then such discounting is usurious, for it is then that it first exists as a contract. *Ibid.*

Z, being insolvent and desirous to raise money, applied to F, and obtained his promissory note for $250, payable sixty days after date to Z, for the purpose of selling it to raise money. No consideration was paid for the note. Z endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being a lent note, for the sum of $200. The maker of the note was in good circumstances. *Held*, that the note was usurious and void. *Cockey* v. *Forrest*, 1 *Gill & Johnson*, 482.

A, being embarrassed, and having a promissory note payable to himself, endorsed and delivered it to H, his clerk, with instructions to raise money on it by a sale of it to the plaintiff, and at the same time directed the clerk to conceal from the plaintiff that the note was his, A's, property. The clerk sold it to the plaintiff at a discount of thirty-three and a half per cent., and represented it as his own property, and endorsed the paper to the plaintiff, without recourse to himself, in the event of the failure of the others who were liable on it. In a suit by the plaintiff against A, it was *held* that the transaction was usurious. *Ruffin* v. *Armstrong*, 2 *Hawks*, 411.

Debt on bond—and the case was this. N executed a bond upon a bona fide consideration to M, who afterwards sold the same to Collier at a greater discount than six per cent. per annum, and by his endorsement bound himself for the full amount of the bond. Collier sued M, and the plea usury. *Held*, that the plaintiff may recover the

full amount of the obligor, notwithstanding he claims through an usurious endorsement. *Collier* v. *Neville*, 3 *Dev.* 30.

The object of the statute of usury is to protect the borrower, not to enable a lawful debtor to avoid the payment of a lawful debt, and hence the latter cannot aver an usurious assignment, so as to defeat the assignee. *Ibid.*

A distinction exists between the usurious discount of accommodation notes, and notes which are perfect, and on which an action can be maintained. In the first case, the discount is a loan to the maker, and the note is void under the statute. In the second, it is the purchase of an existing valid security, and the endorsee may recover on it. *Ibid.*

The sale of a promissory note, endorsed by the seller, at a discount exceeding the lawful rate of interest, is not in all cases usurious, but it is *prima facie* valid; and it is incumbent on the party claiming it to be usurious to show the circumstances which bring it within the statute. In an action against the maker of a promissory note which was valid in its inception, brought by an endorsee, who took it of the payee on a usurious consideration, the defendant may avail himself of such intermediate usury to impeach the plaintiff's right to sue. *Lloyd* v. *Keach*, 2 *Conn.* 175.

A sheriff having demanded payment of an execution in his hands against the defendant, which was nearly out, the defendant made his promissory note payable to the order of a third person, and by him endorsed in blank, and delivered it to the sheriff, contracting with him, that if the defendant should not pay the execution in ten days, it might be sold in market, or otherwise disposed of, and the avails applied in payment of the execution. After the expiration of the ten days, the execution remaining unpaid, the sheriff delivered the note in the state in which he received it to the plaintiffs on their advancing to him a sum of money less than the face of the note, by more than the legal interest for the time the note had to run. *Held*, that the note so received by the sheriff was in security of the execution, that he had an interest in it, coupled with a power to sell; and that consequently it was an effective instrument in his hands, and not being usurious in its original concoction, it did not become so by the subsequent sale to the plaintiffs. *Tuttle & Holt* v. *Clarke*, 4 *Conn.* 153.

No confirmation, however solemn, can give efficacy to an usurious agreement. The undertaking of one of the makers of the note to the endorsee at the time of the endorsement, stating that the note was good and he would pay it, will not enable the endorsee to recover, if

the consideration of the note was usurious. *Solomons & Co.* v. *Jones & J*, 1 *T. Conf. R.* 144.

Where in consequence of an usurious agreement a person is procured to endorse the note given in the usurious transaction, although the endorser at the time knew nothing of the usurious transaction, yet his endorsement is usurious and void. *Wilkes* v. *Brumer*, 2 *McCord R.* 178.

In an action by the endorsees against the endorser on a note for $1,875 63, drawn by Brown & Moses, payable to the defendant, and by him endorsed, it appeared from the testimony, that Brown, of the firm of Brown & Moses, on or about the 24th December, 1818, borrowed of William Payne & Son, (the plaintiffs,) the sum of $3,500; for the use of which, for fifteen days, he paid $92 50, being at the rate of sixty-five or seventy-five per cent. That some time previous to that, Brown & Moses drew the note now in suit, and it was endorsed by the defendant as a friendly act, to enable Brown to payfor certain merchandise which he had purchased, but was never used for that purpose; and when Brown borrowed the said sum of $3,500, for which he paid usurious interest, he passed away this note, with others, to the plaintiffs, as collateral security for the loan. The court held the note usurious in its inception, and set aside the verdict for the plaintiffs. The fact of the note in this case having been originally intended for a legal purpose cannot vary the case, as it was never used for that purpose: it had no legal existence until passed by Brown to the plaintiffs; no consideration had ever been paid for it; it was in fact no more than a *carte blanche* until put in circulation. *Smith's Adm'rs* v. *Payne*, *Rice's Digest*, 37.

A note is made and endorsed for the accommodation of the payee, and afterwards put into the hands of a broker by the payee to be sold in the market. It is purchased of the broker by a person who has no knowledge that it is accommodation paper, or for whose benefit it is sold. This transaction is not usurious. *Whitmarth* v. *Young*, 5 *Randolph*, 333.

An intermediate endorser of a valid note for an usurious consideration, as between endorser and endorsee, will not vitiate the note in the hands of a subsequent *bona fide* holder, without notice of the usury. *Ibid.*

Negotiable notes, made by H & H, endorsed by A, for the accommodation of H & H, to be sold in market, purchased by B from a broker, who sells them for H & H at a greater discount than six

per cent., are not usurious in the hands of B, without proof that B knew the fact. (*Quere.*) 1 *Gilmer*, 42.

Previous to the passage of the statute of 1819, A executed a note, and B endorsed it, with a view to obtain for A the loan of a sum of money from C, and C loaned the money to A, at an usurious rate of interest on the faith of the note. Decided, that it appearing that the transaction was an usurious loan of money by C, the note was *void*, and A and B absolved from all liability to C for the money loaned by him to A. *Outen* v. *Graves*, 7 *J. J. Marsh*, 630.

SECTION XII.

For prompt payment.

A debtor owing a debt due, agrees to give the creditor his bond for it, payable at a future day, and to add to the debt and insert in the bond a sum equal to five per cent. on the debt to cover commission, which the creditor might be compelled to pay an agent for collection; and the bond is given accordingly for the aggregate, including the commission, with a verbal agreement, that if the debtor should pay the debt punctually, he should be exempted from the payment of the sum inserted in the bond for commission for collection. In debt on the bond and issue joined on the plea of usury. *Held*, 1. Parol evidence is admissible to prove the verbal agreement as to the sum allowed for commission. 2. The contract is not usurious, since the debtor might, by punctual payment of the debt, relieve himself from the payment of the sum he contracted for commission. 3. The creditor stipulating that the debtor should pay the commission which would be incurred in the collection, in default of punctual payment, if made in good faith to cover such commission, and not as a device to evade the statute of usury, was in point of law not usurious, and the court ought so to direct the jury; leaving the jury the question of fact, whether the contract for commission was made in good faith, or was an evasion of the statute. *Campbell* v. *Shields*, 6 *Leigh*, 517.

A contract to pay interest from the date of a note, if it is not paid punctually, when it becomes due, is not unlawful or usurious. 1 *Yerger*, 502.

A judgment is recovered against a principal and surety. Upon an agreement, then, the surety signs the replevin bond, and the principal gives him a note, which includes the full amount of the replevin bond,

with about thirty per cent. added to it; and the surety agrees in writing to credit the note with the same amount, provided the principal pays the replevin bond himself. They agree in the pleadings that the arrangement was intended, not merely to have the effect of a penal bond, but as an indemnity to the surety in case the payment of the replevin bond should devolve upon him. *Held,* that this contract is but an agreement for a loan of money in a certain contingency at a future day, upon an agreement that more than six per cent. should be paid for the loan, and is usurious. The surety may enforce a judgment he has on the note to the amount actually paid by him in discharge of the replevin bond, with legal interest from the time when he paid it. From the balance the principal is relieved in equity. *Moore's Exec.* v. *Vance,* 3 *Dana,* 362.

Wherever the debtor, by the terms of the contract, can avoid the payment of a larger, by the payment of a smaller sum at an earlier day, the contract is not usurious, but conditional, and the larger sum becomes the penalty. Where the holder of a bond, for the payment of a certain sum, promised to surrender the bond upon the payment of a less sum at an earlier day; to take advantage of such promise, there must be a strict compliance on the part of the obligor. To constitute usury, the obligation to pay more than the legal rate of interest, must be absolute on the face of the transaction, (i. e., not conditional or upon a contingency.) A contract, good in its creation, is not avoided by a subsequent usurious consideration; but such subsequent taint will effect the after holder, as against the endorser. *Moore* v. *Hilton,* 1 *Dev. Eq.* 429.

One sells goods at three months' credit, but stipulates, in case the money is unpaid, that the vendee shall allow him a *half penny* on same per month till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but above the legal rate of interest. This contract, being a *bona fide* sale, is not usurious. *Otherwise* if it had been merely colorable to cover a loan and evade the statute. *Floyer* v. *Edwards,* 1 *Cowper,* 112. See remarks of Lord Mansfield in this case, *post* 75.

SECTION XIII.

When compound interest may be taken.

Compound interest will be allowed where a trustee is directed to invest funds and reinvest the dividends; and where the trust directs

an accumulation, and the trustee has used the funds. Yet the ground of this allowance is the actual or presumed gain of the trustee by the use of the funds. Where the circumstances forbid the presumption of gain by him, it will not be allowed. *Ringold* v. *Ringold*, 1 *Harr. & Gill*, 11.

Compound interest is not forbidden by the statute against usury, but it is held to be iniquitous, and Chancery will not decree it, though agreed to by the parties. *Breckenbridge* v. *Brooks*, 2 *A. K. Marsh*, 335–339.

Interest will sometimes be allowed on the whole sum due, though it is partly composed of interest accrued. *Kennon* v. *Dickens*, *Tayler*, 231.

Compound interest will never be allowed, except in very peculiar cases of hardship and default on the part of a trustee. *Armstrong* v. *Campbell*, 3 *Yerger*, 201.

Compound interest is never allowed, except in special cases, as where a settlement of accounts takes place after interest has become due; or there has been an agreement for that purpose, subsequent to the original contract, or the principal and interest are computed in a master's report, and the same is confirmed. *Connecticut* v. *Jackson*, 1 *John. Ch.* 13. *Darrel* v. *Ecten*, 3 *De Saus.* 241.

An original agreement, at the time of the loan or contract, that the interest when it falls due shall bear interest, is invalid. 1 *John. Ch.* 13. 6 *Idem.* 313. 4 *Randolph*, 408. *Mowry* v. *Bishop*, 5 *Paige*, 98. But an agreement to pay interest on arrears of interest, which have already become due, is valid. 5 *Paige*, 98.

Compound interest on an English mercantile debt, was held to stop when the mutual dealings ceased. *Higginson* v. *Air*, 1 *De Saus.* 427.

As a general rule, interest on interest is not allowable. But when the sum is ascertained, and the annual payment of it forms a part of the contract; where it is so specific, that the debt may be sustained, and interest recovered by way of damages for the detention; and particularly when the payment of a principal sum is postponed to a distant period on the faith of a regular discharge of the interest, it ought to be allowed. *Kennon* v. *Dicken*, *Cameron & Norwood*, 357.

Where a trustee refuses to account, the court will adopt the most rigid rule for calculating interest. Compound interest is sometimes allowed on that ground, and directed to be calculated on short rests. *Myers* v. *Myers*, 2 *McCord's Chan.* 214–266.

There are many cases in which compound interest is allowed; as where interest is ordered to be paid annually for maintenance and education, interest was allowed on the annual balance. *Ibid.*

Interest is not of course to be compounded in favor of a ward against the executor of his guardian; but simple interest only is to be computed from the death of the latter, unless compound interest was named. *Ryan* v. *Blount*, *Dev. Eq.* 382.

D, in 1815, voluntarily assumed a trust over certain real property, and from that period until 1828, from time to time every year received large sums of money from the estate, which he continually employed in speculation. To the bill first filed against him for an account of the rents and profits, he filed more than one defective answer, withholding the discovery sought for, and endeavoring to stifle inquiry. He neither paid, nor offered to pay, the *cestui que trust* complainants any thing. *Held*, that under these circumstances he was liable to pay compound interest, estimated on the balance in his hands at the end of each year. *Diffendorffer* v. *Ward*, 3 *Gill & John.* 311.

If trustees use the trust money for their own purposes, they are chargeable with compound interest. *Scheffelin* v. *Stuart*, 1 *John, Chan.* 620.

Compound interest is allowed againt a trustee, only in cases of gross delinquency. *Clarksons* v. *Depeyster*, *Hopkins*, 424.

A creditor kept an account current with his debtor, and also an interest account, in which he charged interest on the several items of *debit* to a particular period, and gave credit by interest on the several payments to the same period, and charged in the account current the balance appearing in the interest account. A balance being then struck, and a new account opened, in which interest was charged on that balance, thus consisting of principal and interest; it was held to be compound interest, and not allowable. *Lewis's Ex'rs* v. *Bacon's Ex'rs*, 3 *Henning & Munford*, 89.

A partner who withdraws the partnership funds will not be liable for compound interest, unless he has traded or speculated with them so as to make a profit. *Stoughton* v. *Lynch*, 2 *John. Chan.* 209.

Compound interest is not allowed, unless on a special agreement in writing, after the lawful interest has become due. The agreement to be valid must be prospective in its operation, as that the interest then due and payable shall carry interest thereafter. *Van Benschoten* v. *Lawson*, 6 *John. Chan.* 313.

An agreement made at the time of the original contract or loan, that interest shall begin and run upon the lawful interest, from the

period stipulated for its payment, is not valid. *Connecticut* v. *Jackson*, 1 *John. Chan.* 13.

If an executor, administrator, or trustee, convert the trust moneys to his own use, or employ them in his business in trade, he is chargeable with *compound interest*. *Scheffelin* v. *Stuart*, 1 *John. Chan.* 620.

Where an administrator employed the moneys belonging to the intestate's estate in trade, for his own benefit, of the profits of which he refused to give any account, the master, in stating an account, charged *compound interest*, making annual rests in the account for that purpose, which was confirmed by the court. *Ibid.*

The court in directing payment of a legacy, the interest of which had been directed by testator to be paid annually, allowed interest on the annual arrears of interest. *Bowels* v. *Drayton*, 1 *De Saus.* 489.

Interest must be paid on the interest, where by the will the interest is required to be paid *annually*, for the legatee's benefit. *Wright* v. *Wright*, 2 *McCord's Chan.* 202.

If compound interest is voluntarily paid by the debtor, it cannot be recovered back. *Mowry* v. *Bishop*, 5 *Paige*, 98.

Compound interest is never allowed in favor of a trustee. *Everson* v. *Tappan*, 5 *John. Chan.* 517.

Interest may be charged on an open account, when the contract stipulates for a certain period of credit; but the law does not permit rests to be made in such account every six or twelve months, restating the account at each time, and converting interest into principal; and no custom or agreement to that effect can alter the law. *Morr* v. *Southwick*, 2 *Porter's R.* 351.

Guardians of lunatics are responsible for compound interest in the same manner and to the same extent as guardians of infants; and bonds, &c, payable to them as guardians, bear compound interest in the same manner as bonds payable to the guardians of infants. *Spark* v. *Long*, 1 *Ired. Eq.* 426.

A debtor owing a debt, consisting of principal and interest, it is agreed between him and his creditor, that he shall in the first place pay off the principal, and that the interest may for a time remain unpaid. The creditor having received money from the debtor, applies it in satisfaction of the principal. Afterwards many years elapse without payment of the interest. *Held*, that the creditor is only entitled to the interest due at the time the principal was paid, and not to interest on that interest; there having been no agreement to pay interest on interest. *Pindall's Ex'rs* v. *Bank of Marietta*, 10 *Leigh*, 481.

A commissioner's report shows a balance due from the defendant,

consisting entirely of interest found due on an account never before settled, and states that that balance of interest is to bear interest from a remote day; there is no exception to the report, and the court decrees the balance with interest accordingly. *Held*, that the decree was erroneous in giving interest upon the interest from a remote day. Interest ought to be allowed only from the date of the final decree. *Dunbar's Ex'rs* v. *Woodcock's Ex'rs*, 10 *Leigh*, 481.

Agreement for the payment of the purchase money of an estate by yearly instalments with interest, the four last of which are to be retained by the purchaser as an indemnity, until a good title shall be made, does not entitle the vendor to compound interest on such instalments, upon a bill by him for specific performance of the agreement; it appearing that until such bill was filed he was not prepared to make a good title to the premises in question. *Stratton* v. *Lyman*, 2 *Moore*, 125.

Original contracts for compounding interest have been held oppressive, and evasive of the laws against usury. *Rodes* v. *Blythe*, 2 *B. Monroe*, 336.

If a borrower, without an original agreement, instead of paying the legal interest, agrees to pay interest thereon, as well as on the principal, for further forbearance, it is legal and not usurious. *Ibid.*

If a loan be made at ten per cent., and annually renewed by compounding interest at that rate, the Chancellor will relieve to the extent of the illegal interest, but admit of the annual compounding of interest to the extent of six per cent. *Ibid.*

SECTION XIV.

Where the interest is the difference between the cash and credit price of a thing sold.

Van Schaick *v.* Edwards. Assumpsit upon three promissory notes.

Plaintiff being seized of certain lands in Tioga Co., N. Y., on the first of July, 1796, at Pittsfield, in Massachusetts, sold the same to the defendant, and, in consideration thereof, took his bond for $1228 50, payable in four years; and four promissory notes for £25 each, lawful money of Massachusetts, payable in one, two, three, and four years; and the plaintiff thereupon executed a bond to the defendant, conditioned to convey the land to the defendant upon his paying the bond and notes.

The notes were given for interest on the principal sum mentioned

in the bond, from the time of sale until the time limited for payment, at the rate of six and a half per cent.

The plea of usury set forth the statute of Massachusetts of the 16th of March, 1784, which declares void all contracts for the payment of any principal or money lent upon a greater interest than six per cent.

The plaintiff, at the time of making the notes, resided, and resided at the time of the action, at Pittsfield, in the state of Massachusetts, and the defendant in Tioga county, in the state of New-York, where the lands lie.

Lewis, Justice. How far the *lex loci contractus* is in this case to govern, or whether usury is applicable to any contracts but those which respect loans, I shall not consider, because, in my view of the subject, it cannot be affected by them. For, admitting that the decision must be according to the law of Massachusetts, and that the statutes of usury extend to cases of forbearance, where there has been no loan, in my opinion this would, in no country, be considered a case within them. The amount of the bond and notes together constitute the price, upon payment of which the lands were to be conveyed; and upon whatever principle the plaintiff may have calculated the difference between his cash and his credit price, whether on that of a certain rate of interest, or on an equivalent for the probable increased value of the land at the period of payment and execution of the conveyance, is perfectly immaterial. He may, certainly, without exposing himself to the penalties of usury, ask one price, in cash, for his lands, and any greater sum on credit; and although he should assign as a reason, that lands sold on credit ought to yield more than legal interest, the nature of the contract would not be more affected thereby, than if he should say, My lands, if kept to such a day, will yield me so much, therefore, I will ask it. The notes speak not of interest, and the plain and simple language of the contract is, On your paying me $333 33, in four equal annual payments, and the further sum of $1228 50, at the end of four years, I will convey to you, &c. The Judges were divided on other points, but the plaintiff had judgment. 2 *Johnson's Cases*, 355.

Joseph Beete *v.* Henry Fisher Bidgood. Assumpsit on the following promissory note:—

London, 10*th March*, 1821.

On the first July, 1825, we promise to pay to Joseph Beete, Esq., his executors or administrators, at the house of Messrs. Sandback, Tuine & Co., of Liverpool, the sum of £3968, for value received, in

second instalment, with interest included, as expressed and specified in agreement for the sale of his moiety in plantation *Meten Meer Zorg*, in the colony of Demerara, to John Newton.

£3968. JOHN NEWTON,
H. F. SLOANE.

Plea, the general issue,—at the trial before Lord Tenterden, C. J., at the Guildhall sittings, Michaelmas term, 1826, a verdict was found for the plaintiffs, subject to the opinion of this court, on the following case.

The note in question was signed by the defendant, who then bore the name of Sloane, but afterwards changed it to Bidgood. The signature of John Newton, the other maker of the promissory note, was also proved, and that he died before the commencement of the action. The note was duly presented for payment, on the day it became due, at the house of *Messrs. Sandback, Tuine & Co., of Liverpool*, mentioned in the said note, and payment was refused. The agreement referred to in the note, and the account made out, settled, and signed between the parties at the time, were as follows:

The former recited "that Joseph Beete hath contracted and agreed with the said *John Newton* for the absolute sale to him of the undivided moiety or half part of him the said *Joseph Beete*, of and in the plantation called *Meten Meer Zorg*, and the lands in *Masseronei*, and all the buildings, cultivation, slaves, furniture, cattle, and other appurtenances, plantation, and husbandry implements and utensils, and all coffee and other stock on hand, and every thing of what denomination soever, thereunto belonging or appertaining, without any exception whatever, at or for the price or sum of £16,000, sterling money of Great Britain, (being the balance of account already drawn and stated by the said *Joseph Beete* and *John Newton*, and intended to be signed upon the said *Joseph Beete's* signing the special power of attorney, hereinafter mentioned,) which said sum of £16,000, together with interest upon the several promissory notes, added thereto, for the time they have to run, and which are wrote and stated at the foot of these presents, and to be dated respectively the 10th day of this instant month of March, and delivered to the said *Joseph Beete*, upon his signing and delivering the said special power of attorney, are to be in full of the said purchase money; and the said *John Newton* hath agreed to purchase of the said *Joseph Beete* his the said *Joseph Beete's* undivided moiety of half part of and in the said plantation lands, buildings, cultivation, slaves, furniture, cattle, stock in hand,

and every thing thereunto belonging and herein before mentioned, the property of the said *Joseph Beete*, at or for the said price or sum of £16,000, to be paid at the times, including the said interest to be added thereto, by the instalments and in the manner specified in the said several promissory notes, stated at the foot of these presents, as agreed upon between the said *Joseph Beete* and *John Newton*."

The agreement then contained a declaration that plaintiff, for the consideration therein mentioned, did sell, &c., (the premises therein before mentioned,) to *John Newton*, and he thereby agreed to execute on the 10th day of March, (the date of the note,) a power of attorney to A B and C to pass a legal transport of the estate, &c., to *Newton*, according to the existing laws of the colony. At the foot of the articles of agreement there was the following memorandum, signed by the plaintiff:—" I, the undersigned *Joseph Beete*, do hereby acknowledge to have received of and from the said *John Newton* the seven several promissory notes herein after mentioned, respectively signed by the said *John Newton* and *Henry Fisher Sloane*, being the amount of the said sum of £16,000, the money agreed upon for the said purchase, and the balance of the said account stated between them, the said Joseph Beete and John Newton, as aforesaid, together with interest on the said sum of £16,000 added thereto, for the time the respective bills have to run, making in the whole, principal and interest, £20,800, that is to say"—(Copies of the promissory notes were then added.)

The account stated between the parties, debited John Newton with £25,000, "the sum which he agreed to pay for the plaintiff's interest in the *Meten Meer Zorg* plantation;" and then gave credit for several sums of money, amounting in the whole to £9,000, and the balance in favor of the plaintiff was stated at £16,000. The interest mentioned in the several promissory notes, set forth at the foot of the agreement, (of which the note in question was the fourth,) was after the rate of six per cent. per annum, being the legal interest for money in the colony of Demerara.

The question for the opinion of the Court was, whether the transaction was, or was not, usurious.

Lord Tenterden, C. J. The case which is now presented to the consideration of the Court, arises out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price of the estate, and partly upon what was considered its price, if paid for at a future day.

The only difficulty has been occasioned by calling the difference between these two prices *interest*, but it is our duty to look, not at the form and words, but at the substance of the transaction; and as, on the one hand, we should not pay attention to the words of the contract, if the substance of it went to defeat the provisions of the statute of 12, Anne, c. 16, so on the other hand we ought not to rely upon the words, so as to defeat the contract, if in substance the transaction were legal. It appears to me, that in substance, this was a contract for the sale of the estate at the price of £20,800, to be paid by instalments; in that there was no illegality. The defence set up, therefore, fails, and the *Postea* must be delivered to the plaintiff. 7 *Barnwell & Creswell*, 453.

One sells goods at three months' credit, but stipulates, in case the money is unpaid, that the vendee shall allow him a *halfpenny* on the same per month, till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but above the legal rate of interest. The contract, being a *bona fide* sale, is not usurious. *Otherwise* if it had been merely colorable to cover a loan and evade the statute. *Floyer* v. *Edwards*, 1 *Cowper*, 112.

Let us examine, then, what the present contract is. It is said the plaintiff is a lender; but let us see where there is a color of a loan in this case. The plaintiff is a refiner, and deals in gold and silver wire, so is the defendant; and in the ordinary course of dealing, the one buys, and the other sells a quantity of this commodity on the terms and conditions before stated. There is no pretence of any negotiation for a loan, nor that one word passed about *borrowing* money; nor any evidence of an agreement to forbear paying the principal sum, contrary to the true intent and meaning of the statute. What are the terms of the contract? are they any new fangled terms? So far otherwise, that the agreement barely cannot be called an *universal* practice; yet it is the general practice of the trade. It is true, the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury. But it goes a great way to explain a transaction; and, in this case, is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation it will be found that th practiece of the bank in discounting bills exceeds the rate of *five per cent.*, for they take interest upon the whole sum for the whole time the bills have to run, but pay only part of the money, viz., by deducting the interest first, yet this is not usury. Here it appears the whole agreement was made out first, the price of the goods fixed, and a limited credit given; but the party

considers, further that, perhaps, punctual payment might not be made, and provides that in that case the buyer shall pay him so much more. This is no agreement for forbearance, beyond the three months; *the plaintiff might have brought his action instantly;* and, therefore, if not paid, was at liberty to say, that the buyer should pay him a greater price. The authorities go still further, and say, that wherever it is in the power of a known *borrower* of money to pay the principal within a limited time without interest, upon nonpayment, the reservation of a larger sum than the statute allows is not usury; because usury is an agreement, originally, to pay the principal with interest above the rate of *five per cent. Hale's P. C. ch.* 82, *sect.* 19. I see no manner of difficulty to arise from it. I lay the foundation of the whole upon a man's going to borrow, under cover of buying; there the contract is usurious; but where it is a *bona fide* sale, as in this case, it certainly is not. I have never had the least doubt, either at the trial or since; and am of opinion, as I was at that time, that the jury did right in finding that the contract was not usurious. *Per Lord Mansfield,* 1 *Cowper,* 115.

SECTION XV.

Sale of foreign funds.

The drawing and sale of a bill of exchange, in the ordinary course of mercantile business, at a premium or price exceeding the *par* value, when that price is regulated by the state of trade between the place where the bill was drawn and the place where it is to be paid, has never yet, to my knowledge, been deemed a usurious transaction.

A bill of exchange drawn upon funds which the drawer has in the hands of the person on whom it is drawn, or drawn upon the strength of a credit which he has with such person, operates, according to my understanding of it, as a sale and transfer of the amount of money for which the bill is drawn. If that money is in another state or country, it is more or less valuable to the owner or person entitled to draw for it; this value depending on a variety of circumstances, such as the state of trade, the demands for funds abroad, the facility afforded by commercial intercourse for bringing the funds home, and the expense and risk of transportation. The less the difficulties are, and the greater the demand, the more valuable will be the foreign funds to the owner; and like any other commodity, he may sell them for the best price he can obtain. In well regulated mercantile com-

munities, both foreign and domestic exchange, like every thing else which is the subject of negotiation and sale, will have a determinate market value, varying, however, from time to time, according to the demand and the fluctuation of trade. When, therefore, a man draws and sells a bill of exchange, it seems to me perfectly consistent with the nature of the transaction, to consider him as selling funds which he has or is entitled to in the hands of the drawee or acceptor at the place where the bill is to be paid, and to regard the bill itself as the instrument by which these funds are transferred to the purchaser, or subsequent holder of the bill. Such a transaction is not then the lending and borrowing of money, but a sale of foreign or absent funds; and however high the market price may be, it cannot give rise to the question, whether excessive interest has been taken upon a loan for the forbearance of money, (both of which are essential to usury,) because there is no lending and borrowing in the transaction, and no indebtedness or forbearance, except what results from the bill itself, governed by the law merchant applicable to negotiable paper.

I will not deny, however, that there may be cases of lending and borrowing carried into effect by the drawing of bills of exchange; as where one man has funds abroad, and another having occasion for money at that place, applies to borrow it, and the drawer agrees to lend it to him upon certain terms; and then for the purpose of carrying the agreement into effect, and placing the borrower in possession of the money, the lender gives him a draft or order, in the form of a bill of exchange, upon his banker or correspondent abroad. There the application and agreement being for a loan, would be subject to the law against taking excessive or usurious interest, either at the place where the contract is made, or where it is to be fulfilled.

It appears to me there is a manifest distinction between an agreement for the sale and purchase of bills of exchange, which, as I have said, is virtually selling funds abroad, and an agreement for the loan of money, though the latter may be the subject of a bill of exchange for the purpose of putting the borrower in possession, and we must be careful not to confound the one case with the other.

It often happens that a man is willing to sell an article of property, at a much less price for ready money than on a credit. His own necessities may require the sacrifice; but if he cannot obtain ready money, and can get more than the regular cash price by selling on a credit, why may he not sell for the best price he can obtain and give the credit, and then make the sacrifice, if necessary, in the conversion of the security he has taken into money? I know of no law to prevent

men from making their calculations, based upon the present state of the money market, so called, in regard to the price of any commodity they are about to sell, and to fix one price where payment is to be immediate, and another price where payment is to be postponed; and to graduate the difference by the value attached to the use of money at the time, provided it be a real sale, in good faith, and not a mere cover or disguise for usury upon a loan.

It will be perceived, according to these views, that while this can be regarded as a sale of bills of exchange, and not as a lending and borrowing of money, it is immaterial as respects the validity of the contract, what was the amount of the premium charged, or what the difference between a cash and credit sale, or for what cause and upon what principle that difference was made. 3 *Edwards* 146–7, *per McCoun, V. C.*

It is not usurious in a banking company to take their notes payable in Boston bills, and, upon a renewal of the loan, to take a premium equal to the difference between those bills and other bills current at the place of the bank. Nor is such a transaction within the prohibition in the charter of such company to use their monies, &c., in trade or commerce. *Portland Bank* v. *Storer*, 7 *Mass.* 433.

In order to constitute usury, both parties must be consenting to the unlawful interest, that is to say, the lender to ask and the borrower to give. Therefore, if a bill of exchange is drawn upon an obscure man in *Scotland*, although the payee may expect it will be protested, yet if there was no agreement between him and the drawer that it should be protested, the transaction is not usurious. There must be proof of a lending and borrowing to constitute usury. *Price* v. *Campbell*, 2 *Call.* 111, 2*d*, *ed.* 92.

The including of one per cent. in a promissory note, as the difference in the rate of exchange between the place where the payee of a promissory note resides and the place of payment, is not *per se* evidence of usury, where the note is thus made payable for the accommodation of the maker. *Merrell* v. *Benton*, 10 *Wend.* 116.

In an action by a country bank against the endorser of a bill of exchange, mentioning no place of payment, it appeared that the bill was discounted by the plaintiffs for the acceptors—that the drawer, acceptors, and endorser, resided in New York—that the business was conducted by the plaintiffs through their cashier, while in that city—that the avails of the bill were paid in drafts on New York, equal in value to city funds—and that the amount thus paid was the face of the bill, deducting the difference of exchange between country and city

funds in addition to the usual discount. *Held*, that the bill was not usurious. *Cayuga County Bank* v. *Hunt*, 2 *Hill*, 635.

Otherwise, had more than the usual difference of exchange been deducted, or the avails of the bill been paid in drafts having a long time to run. *Ibid.*

Where, upon an application to a bank for a loan of money upon a discount of notes, it was agreed that if the notes were discounted, the borrower should receive bills of exchange for the amount of the loan at a higher premium than the cash value of such bills. *Held*, that the discount of the notes was illegal and usurious; and that the legal effect of the transaction would not be altered, by proving that there was a custom among the sellers of bills of exchange, to charge a higher premium for their bills when they sold on credit than when they sold for cash. *Pratt* v. *Adams*, 7 *Paige*, 615.

The office of the Bank of the United States, at Lexington, Kentucky, in February, 1822, held a large amount of the notes of the bank of Kentucky, which had been received in the usual course of business at the full value expressed on the face of them, as equivalent to gold and silver, and were so considered by the bank. On the amount of these notes so held, the bank of Kentucky had agreed to pay interest at the rate of six per cent. until the same should be redeemed. All the notes of the bank of Kentucky, held by the bank of the United States, were finally paid with interest. In February, 1822, when the notes of the bank of Kentucky were at a depreciation of between thirty and forty per cent., Owens applied to the office of the United States Bank for a loan of $5,000 of the said notes, saying they would answer his purpose as well as gold and silver. After repeated refusals and re-applications, with the consent of the board at Philadelphia, the sum of $5,000 in the notes of the bank of Kentucky were loaned to him on a promissory note signed by him and by W. Miller and Wayley, payable in three years, with interest at the rate of six per cent. per annum. The money so loaned was paid to the borrower in the notes of the bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the bank of Kentucky to the bank of the United States, ceased from the date of the loan. In an action on the note given by Owen and others, the defence set up was, that the transaction was usurious. *Held*, there was no taking of usury, and no reservation of usury on the face of this transaction. The case then resolves itself into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device, or shift, to reserve

or take usury, and none appears in the case. *Bank of U. S.* v. *Waggener*, 9 *Peters*, 378.

M, having a large debt against one who had assigned his estate in trust for creditors, applied to the assignees for a loan of $12,000 from the trust fund, until a dividend should be made; whereupon the latter let him have notes belonging to the estate, which, estimating them at their nominal value, amounted to $8,254 69, besides cash to the amount of $3,745 31, and took therefor M's note for $12,000, with interest. *Held*, that though there was evidence tending to show the notes which M received to have been worth considerably less than he allowed for them, the transaction was not necessarily usurious, but depended upon the intent with which the loan was made. *Sizer* v. *Miller et al*, 1 *Hill*, 227.

Certain state stock, held by a banking association, was depreciated in the market, yet a party chose to take it at par, and give his bond and mortgage for it at the par amount. *Held*, not to be a usurious transaction. *Willoughby* v. *Comstock*, 3 *Edw.* 424.

Depreciated bank paper, like stocks, or other commodities, is a fit subject for contract of sale or barter. It may be sold, or exchanged for money or property, without any imputation of usury. If one individual believing that Kentucky bank paper would be equal to specie in one year, should purchase it for his own promissory note to the full nominal amount in specie on a credit of two years, we cannot imagine why he may not do so; nor can we perceive why the circumstance of giving his own note, instead of any other thing, in exchange for the bank notes, would taint the contract with usury. It might be a slight circumstance tending to strengthen others conducing to prove usury. But the contract could not be considered *per se* an usurious one. But where there is a contract of borrowing and lending, the matter is different, or a sale of paper to an applicant for a loan. The reservation of interest in a separate note is a strong indication of a loan, and unexplained should be conclusive. *Boswells* v. *Clarkson*, 1 *J. J. Marsh*, 49–50.

See under Kentucky, 55, 63, 66; *under South Carolina*, 23; *under Massachusetts*, 13; *under Tennessee*, 17; *under Alabama*, 3.

Changing an indent from its real to its nominal value in specie, when it was worth only eight and a half for one, will make a contract usurious. *Atkinson* v. *Exec. of Scott*, 1 *Bay R.* 307.

The giving of a certificate of deposite, payable at a future day, does not render a bill of exchange discounted by a bank void for usury, where the certificate was granted at the request and for the accommodation of the party obtaining the discount, and there is no intent to take usury. *Knox* v. *Good*, 25 *Wend.* 643.

A loan at par of bank notes, passing at from two to five per cent. discount, unexplained by circumstances, would be usurious; but where the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction would not be deemed usurious, unless the privilege was a mere cover to cloak a usurious design. *Croton* v. *Shaw & Tiffany*, 3 *Harris & Gill*, 13.

A contract for the sale of $6,000, U. S. eight per cent. stock, to be delivered and regularly transferred on a future day, for $6,000, current money in hand paid, is not usurious. *Bull* v. *Douglass*, 4 *Munf.* 303.

Action upon note: upon issue joined, verdict that the obligation was given for the loan of $16,839, in *final settlement certificates*, and that it was corruptly agreed between plaintiff and defendant, to give the plaintiff $1,000, in lawful money, for said loan, for the term of six months, more than the lawful interest, and that said contract was usurious. Motion in arrest, held by the court, that such agreement was not usurious, because it was not for the payment of a *greater value* than the amount of the loan with an advance thereon, at the rate of six per cent. per annum. That if it be of greater quantity, though of the same kind of article, is not sufficient; if the article be of a fluctuating value, it may not, at the time of repayment, *be* worth more or so much. The contract in this case, though in the form of a loan, was really in nature of a speculation and bargain of hazard. It depended on a contingency, viz., that of depreciation, whether all or how much of the principal or value loaned should be repaid, and which of the parties the speculation should ultimately favor, which takes the contract entirely out of the statute. Judgment for plaintiff, *non obstante*. *Hamlin* v. *Fitch*, *Kirby's R.* 260.

This was reversed, by the Superior Court of Errors, Oct. 1789. 1 *Root*, 110.

In a sale of public securities, where the defendant has his election to return them at a certain time, or to pay a certain sum for them, this is not usurious, nor is there any room for chantering as to the damages. In this case, however, the action was on a note, and the plaintiff gave a counter writing to receive the certificates in payment

at a certain time. Defendant positively charged usury in the agreement. P. Dyer, Justice, dissenting, upon the ground that the averments were positive, and the facts should have been submitted to proof; but by the court not allowed, and judgment for plaintiff. 1 *Root*, 393.

Action upon note, dated May 4th, A. D. 1790, for £400, payable in final settlement notes, within one year from date. Usury pleaded; the note was all the evidence to the jury. Verdict for plaintiff, £350 damages. *Patterson* v. *Thompson*, 1 *Root*, 526.

In action on a promise *to pay* $88 *in current bank bills, such as pass at Norfolk between man and man;* to which the defence was usury. The defendant having proved that the consideration was only $80 in specie, the plaintiff, to repel this defence, offered to prove that such bills, at the time of the contract, were worth ten per cent. less than their nominal amount. It was held, that this was a promise to deliver bank notes of the specified description to the nominal amount of $88, and that, therefore, such evidence was relevant and proper. *Phelps et al* v. *Riley*, 3 *Conn.* 266.

Of the lex loci in such cases.

Where R, a resident of the state of New York, applied to C, at his residence in England, for a loan of money, upon the security of a bond and mortgage on lands in New York, at the legal rate of interest in that state; and it was then agreed, that upon the return of R to New York he should execute his bond and mortgage, and have the mortgage duly recorded in the county where the land was situate, and that upon the receipt of the bond and mortage by C, in England, he should deposite the money loaned with the bankers of R, in London, for his use; and the bond and mortgage were executed, and the money received accordingly. *Held*, that the mortgage was a valid security for the loan, according to the laws of New York; and that, upon a bill filed there to foreclose the mortgage, R could not set up the usury law of England as a defence to the suit. *Chapman* v. *Robertson*, 6 *Paige*, 627.

If a contract be made in another state by its citizens, and it be wholly usurious according to its laws, no recovery can be had on it here. *Houghton* v. *Page*, 2 *N. H.* 42.

Superior Court of Errors, 1807. *Kent* v. *Phelps*. In the court below, Phelps sued Kent on a promissory note. The defence, usury. Evidence,—Thomas Service, of New York, sent to *Staples*, of New

Haven, where the defendant lived, an account for collection. Defendant could not pay, and required time. Staples refused to give time, unless the defendant would include his expenses and seven per cent. interest on the account, and threatened to attach his property. Defendant assented to the terms, gave his note to Oliver L. Phelps, endorsed, including twelve or thirteen dollars expenses, and seven per cent. interest on the account, up to the end of ninety days then future. The account was for merchandise, and a note executed in New York. Verdict for plaintiff, by direction of the court. Now *reversed*, because the question of usury, or the fact of including seven per cent. being a cover for usury, was a question for the jury, and not of law. 2 *Day*, 483. On new trial, judgment for plaintiff. 4 *Day*, 96.

It is a good defence to an action by endorsee against the endorser of a note endorsed for the accommodation of the maker, that the endorsee received the note as security for the performance of a usurious contract between him and the maker. In an action on a note made and negotiated in another state, the question whether such note is void for usury must be decided by the law of that state. By the law of New York, a note, though given for no more than the amount of the money loaned, is usurious and void, if the borrower, at the time of the loan, agrees to pay the lender more than legal interest. *Dunscomb* v. *Bunker*, 2 *Metcalf*, 8.

The statute of 1819, which provides that the borrower may establish a defence of usury by his own oath in certain cases, does not extend to contracts made out of this state, by persons residing in other states. *Wilson* v. *Walker*, 3 *Stewart*, 211.

A contract for the loan of money, upon which a note and surety is taken, and which, by the terms of the note, is to be repaid in *another state*, (not containing any agreement as to the particular rate of interest to be charged,) which, after maturity and the insolvency and death of the borrower, is extended by his sureties upon a new contract, under which a higher rate of interest is charged upon the note after its maturity than is authorized by the laws of the state where the note is payable, is usurious. *Ely* v. *McClung*, 4 *Port. R.* 128.

The courts of one state cannot judicially know what are the laws of another. The courts of this state will give effect to a contract according to the law of the place where it is to be performed, *unless* it violates some law of the *lex fori*, or comes in contact with the established policy of the country; but the remedy is governed by the law of the *lex fori*. Every endorsement is a new contract. *Givens* v. *The Western Bank of Georgia*, 2 *Alabama*, 397.

The transfer of lands or other heritable property, or the creation of any interest in or lien thereon, must be made in conformity to the local laws of the place where the property is situated. And such local laws must be resorted to for the purpose of determining what is to be considered real or heritable property, so as to give it locality at such place. 6 *Paige*, 627.

A contract entered into in another state, in violation of the laws of that state, cannot be considered as made with reference to the law of the place of contract; but the rights of the contracting parties, if litigated in this state, must be determined by our own law. *Turpin* v. *Povall*, 8 *Leigh*, 93.

An agreement made in Ohio, in relation to lands lying in New York, void by the statute of the latter state, in relation to champerty and maintenance, cannot be enforced there. In relation to such agreements, the *lex loci rei sitæ* governs. *Giddings* v. *Eastman*, 1 *Clarke*, 19.

Land is governed by the laws of the country in which it is situated. *Corie's Case*, 2 *Bland*. 488.

Having gone through the cases in which a variety of transactions have been considered as either subjected to or exempted from the taint of usury, in order to render a transaction usurious there must be, says Comyn,

I. A loan, either express or implied.

II. An understanding that the money lent shall be returned at all events.

III. That not only the money lent shall be returned, but that for such loan a greater interest than £5 *per cent.* shall be paid.

And, I. The word "loan" must not be too strictly construed. For there are many cases in which, though no loan originally occurred, yet, by some subsequent agreement between the debtor and creditor, usury may be generated; and it should always be remembered, that the statute lays as much stress upon the word "*forbearance*," as upon the word "*loan*." And however some of the older cases may be construed, it now appears clear, that where money is owing upon any kind of contract, and forbearance is given for such debt upon the condition of receiving more than £5 *per cent.* forbearance-money, such a forbearance is as much usury as if the sum of money had been absolutely *lent* upon a contract to pay more than legal interest. "It is not necessary to the creation of a loan, that money should be paid on one hand and received on the other; for the circumstance of a man's money remaining in another's hands in consequence of an agreement

made for that purpose, will equally constitute a loan." 1 *Cowper*, 113. 1 *Vesey*, 531. 3 *Term Rep.* 425.

But in such case, it is necessary that the debt be absolutely incurred, and not merely resting upon an executory agreement, the execution of which depends upon circumstances that may never take effect. *Spurrier* v. *Mayoss*, 4 *Brown's Ch. Rep.* 28.

But though forbearance upon a debt incurred by any legal means will give equal room for usury, a great distinction must be made between a loan and a sale. For if such sale be real, and not intended as a cover for usury, the mere circumstance of inequality of price will never bring the transaction within the statute. Therefore, where an annuity, or where goods have been really sold, although the vendor is sure to receive a greater profit than £5 *per cent.*, he will not be chargeable with usury.

It may, however, sometimes happen that the transaction may assume a form which may induce suspicion, though the parties may have been very wide of any usurious intent. The question, therefore, of a culpable intention must always be open to the opinion of a jury; while it is the exclusive province of the court to decide as to the legality of the transaction itself. When more than £5 *per cent.* is received or bargained for by the very terms of the contract, no doubt can exist as to the fact; but where a contract has been made, which, though it be of a suspicious aspect, may yet by possibility be fair and honest, it will be necessary to call upon a jury to determine its character.

II. There must be a contract for the return of the money *at all events.* For if the return of the principal with interest, or of the principal only, depend upon a contingency, there can be no usury; because, that which may never be received cannot be said to be forborne for any given time. But if the contingency extend only to the interest, and the principal be beyond the reach of any hazard, the lender or forbearer can, in such case, lay no claim to interest above the legal rate, without being guilty of usury. But a distinction is to be observed between a contingency merely affecting the interest, and an option which the debtor has of defeating the payment of any interest by a performance of some act stipulated for at the creation of the contract; for when such an option is given, and the debtor either neglects or refuses to avail himself of such condition, the law insists upon his paying such additional interest, as a penalty for his neglect or refusal.

Upon the consideration of the hazard which affects the principal, the advance of money by way of insurance, bottomry, *post obit*, or annuity, has been sanctioned by the courts. But in all these cases, it

should be clearly seen that no usurious transaction is concealed beneath such as are thus favoured by the law. For then no form will protect the contract; the substance must be taken into consideration, and any usurious intention will vitiate an insurance, or an annuity, as much as if there had been no such disguise assumed by the contract.

III. There must not only be a contract that the money shall be returned at all events, but also that it shall be returned with more than lawful interest.

And this part of the agreement must be with the full consent and knowledge of the contracting parties; though if a transaction be entered into, which is, in point of law, usurious, it will not avail the parties that they were ignorant of the law, provided they entered into the contract with their eyes open. *Marsh* v. *Martindale*, 3 *Bos. and Pul.* 154. And it does not matter whether the illegal interest is to be paid in money or goods; or whether the transaction is a transfer of stock or a sale of goods, so long as the lender gains more than five *per cent.* for his forbearance. Yet where trouble, or expense, or inconvenience is sustained by the party advancing the money, the law allows of a reasonable compensation for this, in addition to the interest becoming due; as in the case of brokerage, or in the negotiating of bills of exchange. And though it will be usury, if the interest be received before the expiration of the time for which the principal is forborne, yet the mercantile custom of discounting bills of exchange will be sanctioned by the courts, unless, by being carried into the extreme, it enables the parties to advance and receive a large sum of money without any adequate forbearance; especially where the character of the parties is other than mercantile. And where interest has once become due, it may, if a balance be agreed on, be added to the principal in arrear, and carry future interest upon the gross sum.

An exception to the restriction to £5 *per cent.* must be made in favour of contracts which have arisen in foreign countries, and which are allowed to carry the established interest of such country. And even where the security is executed in this country by the parties here resident, upon *lands* lying in *Ireland* or the *West Indies*, the interest of those particular places shall be allowed: an indulgence which is created by statute, and which extends only to *real*, and not to *personal*, securities.

CHAPTER III.

OF THE CONSEQUENCE OF THE USURIOUS CONTRACT OR SECURITY.

THE second provision of the statute naturally brings us to the consideration of the contracts and assurances which are void upon the ground of usury, and the consequence of such contracts and securities.

SECTION I.

As affecting the parties to the usury.

Every contract, assurance, or security, which is founded in usury, is *ipso facto* void, and can never be rendered valid by the subsequent act of the parties, (1 *Bulstrode*, 17,) and it matters not whether or no the contract be carried into execution, so as to render the receiver amenable to the penalty of the statute; the usurious contract or security is extinct at its very inception. 4 *Leon.* 43. 3 *Leon.* 205. 1 *Mod.* 69. *Moore*, 397. And, according to one authority, this is not the effect of the statute alone, but even at common law, usury avoided the contract. *Oliver* v. *Oliver*, 2 *Rals. Rep.*, 468. To this rule there is, however, as we have already seen, one exception. Where a mortgage is given on lands in a foreign state, according to the law of that state, such mortgage will be sustained in *rem*, notwithstanding the contract of loan will be invalid in every place where it is sought to be enforced. *See the case of Chapman* v. *Robertson*, 6 *Paige*, 627.

Therefore, if a man take a bond from another for the payment of a certain sum, with excessive interest, although in fact he only take the principal with legal interest, still the bond will be void. 4 *Leon.* 43.

And where money had been lent, for securing which a lease was made, conditioned for the repayment of the principal; and, by a further agreement, the lender was to receive usurious interest; it was

holden that the lease was void, although it was only taken for the payment of the principal money, and not for the payment of the interest. *Croke Jac.* 507.

So a judgment given upon an usurious agreement, where part of the agreement is to have a judgment, may be avoided by *audità querelà*, by *scire facias*, or by the interference of the courts. *Earl of Oxford's case, in* 1 *Chan. Rep.* 9.

Therefore, where it had been found by verdict, on the trial of a feigned issue directed by the court, (*Barnes*, 277,) that the warrant of attorney to enter judgment was given in consequence of a usurious contract, the Court of Common Pleas ordered the judgment to be set aside, and the warrant of attorney and the bond whereon the judgment was entered to be delivered up, and the plaintiff to pay the costs of the application. *Barnes*, 52, 3*d edit.*

And in a subsequent case, the Court of Common Pleas set aside a warrant of attorney and judgment, given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but they refused to order a bill of exchange to be delivered up, which had been given to procure the defendant's release out of execution on the judgment. 1 *Bos. & Pul.* 270.

In debt on bond, the defendant, after Oyer, pleaded that it was an usurious contract, &c., and upon evidence it appeared that the wife of the plaintiff used to lend money to be paid by the week, and that she lent to the defendant £20, to be paid by 20s. per week, and 1s. 6d. per week for interest. Lord Chief Justice Holt ruled that it was an usurious contract; and that though it was not sufficient to charge the husband *criminaliter*, yet it was sufficient to discharge the bond *civiliter;* and accordingly it was found for the defendant. *Barnet* v. *Tompkyns*, *Skinn. R.* 348.

The general rule is, that if parties enter into an usurious agreement, any remote security for any part of the illegal contract, with a distinct and valid debt, cannot be enforced; there being no express agreement to expunge the original bad part of the debt, or forego the excess of interest; although such new security be founded on a new settlement of accounts. *Preston* v. *Jackson*, 2 *Starkie's R.* 237. *Chapman* v. *Black*, 2 *B. & Al.* 588; 7 *Pick.* 40; 12 *Pick.* 126. *Warren* v. *Crabtree*, 1 *Greenleaf*, 167; 7 *Vermont*, 457; 5 *Conn.* 154; 2 *Conn.* 284; 14 *Pick.* 436; 13 *Peters*, 345; 1 *Clarke*, 252.

And a new promise to pay the principal originally lent on an usurious agreement, is not binding, unless all payments beyond legal interest are repaid or deducted. *Wickes* v. *Gogerly*, *Ry. & M.* 123; 1 *Carr. & Payne*, 326. *Jackson* v *Packard*, 6 *Wend.* 415.

A, being indebted to the plaintiff in £90, and £20 upon legal consideration, and in a larger sum on usurious loans, in consideration of the plaintiff's advancing him £150 more on legal interest, procured him the defendant's acceptances for £100, £100, and £50 for securing the whole balance due from A to the plaintiff. It was *held*, that these bills were tainted by the usurious transactions, and could not be enforced against the defendant, the acceptor, even to the extent of the debts untainted by usury. *Harrison* v. *Hannel*, 5. *Taunt.* 780.

So where a bankrupt, after he had obtained his certificate, promised to pay a creditor the balance of a usurious debt, on condition that he would advance him another sum, and then gave the creditor security for the gross amount of the former balance and the new loan, the security would seem to be infected by the usurious taint of the first transaction. *Exparte De Grouchy in re Butler*, 2 *Deacon*, 79; 3 *Mont. & Ayr.* 22.

Where a note could not be available till discounted, and is discounted at a sum greater than the legal interest, it is usurious and void; and this whether the person discounting knew it to be a note before unavailable or not. A note made and endorsed for the purpose of fair discount at a bank, if discounted by another at an usurious rate, is void; so if it be made and endorsed for lawful discount anywhere, though it be discounted by the person intended at an usurious rate, it is void. A note void as between the parties for usury, is void, even in the hands of a *bona fide* holder. 8 *Cowen*, 669. Knowledge of one party discounting a note for a firm, is constructive knowledge to the whole firm: and, therefore, if negotiated to other members of the firm without actual notice, a new substituted security taken by them is void. *Idem.*

But where a *bona fide* holder of a usurious note, without notice of the usury, takes a new substituted security, this cannot be avoided for usury. A renewed security, including the usury of the first, to one who was party to the original usury, is equally void with the first; and so to one who has notice of the usury. *Idem.*

SECTION II.

As affecting strangers.

Not only are usurious securities void as between the original parties, but the illegality of their inception affects them, even in the hands

of third persons, who are entire strangers to the usurious transaction.

In Ellis *v.* Warnes, where the plaintiff declared upon a bond for £200, and the plea was usury, it appeared that the defendant, being indebted to one Alder in £100, agreed with him for the forbearance of that sum for a year, that he would give him £30, and make a bond to Alder of £60, for the payment of the said £30. Accordingly, he and Alder entered into a bond to the plaintiff for the payment of the £100; and therefore the bond, it was argued, was void. Three Judges, Gawdy, Yelverton, and Williams, held it good; for they said, "that as, on the one side, it may be said to be the means to defraud the statute, so on the other side it may be a greater mischief to a true creditor, when he shall take security by bond, with sureties for his money, if it should be examined whether there were any corrupt agreement betwixt his creditor and his sureties, whereof he cannot by intendment have any conusance; and it would be a means to draw in question every debt, and to punish one who is not privy to any corrupt agreement." Fenner, Justice, doubted; because it being grounded upon corruption, is altogether ill; and every one is to take heed to his assurance at his peril. Popham, Chief Justice, was absent, wherefore, the other three adjudged it for the plaintiff. *Croke Jac.* 32.

Whatever this case may have decided, the law seems now to be settled that a stranger must 'take heed to his assurance at his peril,' and cannot set up his ignorance of the corrupt contract in support of his claim to recover upon a security which originated in usury.

Thus, in the case of Lowe *v.* Waller, *Douglass*, 735, where the plaintiff was the endorsee of a bill, originally made upon an usurious contract; though he had received it for a valuable consideration, and was entirely ignorant of its vice, the Court of King's Bench, after great consideration, determined, that the words of the statute were too strong, and that after what had been held in the case on the statute against gaming, the plaintiff could not recover.

So, if a bill of exchange is drawn, in consequence of an usurious agreement for discounting it, although the drawer, to whose order it was payable, was not privy to this agreement, still it is void in the hands of a *bona fide* endorsee. *Ackland* v. *Pearce*, 2 *Camp.* 599.

Lord Ellenborough, Chief Justice, observed, that a bill, having been stained by the payee with usury, could never be effective until it were cleansed. Had it been called in by the payee and republished, it might have received an effect *de novo;* but, tainted as it was, every one must take it subject to its vice. It was impossible to reject one part of an

endorsement and retain another part; but that it would be necessary either to receive or repudiate the whole unsound matter.

As, therefore, a *bona fide* holder cannot recover upon a bill founded in usury; so neither can he recover upon a bill where the payee's endorsement, through which he must claim, has been made upon an usurious agreement. But supposing the first endorsement to have been valid, a subsequent usurious endorsement will not affect him; because such intermediate endorsement is not necessary to his title to sue the original parties to the bill. *Jones* v. *Davidson, Holt's N. P. C.* 256.

The courts of New York get over these difficulties by adjudicating that whenever the note or bill in its inception was a real transaction, so that the payee or promissee might at maturity maintain a suit upon it, a transfer, by endorsement on a discount, though beyond the legal rate of interest, shall be regarded as a sale of the note or bill, and a valid and legal transaction. But not so when the paper, in its origin, was only a nominal transaction. 2 *Johns. Cases*, 60. 3 *Johns. Cases*, 66. 25 *Johns. R.* 44.

SECTION III.

Where a new bona fide contract or security is made after an usurious contract or security.

Where a bond has been given upon an usurious contract or consideration, which is afterwards cancelled, and a new bond given *upon the same terms*, it is clear that the substitution of the one security for another, cannot avail the *parties* to the usury; because, as the second bond was given in consideration of the first, which was void, it follows that the second must be void also.

But the case is widely different, where the parties repent of their usury; and, destroying the vicious security, enter into a new contract or security, which is valid and legal.

After usurious securities have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest, is founded on a sufficient consideration, and is binding. *Barnes* v. *Hadley*, 2 *Taunt.* 184. *Kilbourne* v. *Bradley*, 3 *Day*, 356. *Scott* v. *Lewis*, 2 *Conn.* 132. *Church* v. *Tomlinson*, 2 *Conn.* 134, *n.* *Botsford* v. *Sandford*, 2 *Conn.* 276. *Bank of Monroe* v. *Strong*, 1 *Clark*, 76. And the substitution of a bond securing principal and legal interest for a bond agreed to be cancelled, and whereby legal interest

was made payable, is valid. *Wright* v. *Wheeler*, *Peak. Add. Cr.* 175. 1 *Camp.* 165, *n. S. C.* 3 *New Hampshire*, 185. And it was held, even before the 58 George III. c. 98, that if A, for an usurious consideration, give his promissory note to B, who transfers it to C for a valuable consideration, without notice of the usury, and afterwards A give a bond to C for the amount; the bond is good. *Cuthbert* v. *Haley*, 8 *Term R.* 390. *George* v. *Stanley*, 4 *Taunt.* 553. *Chapman* v. *Black*, 2 *Barn. & Alderson*, 588. *Birge* v. *Hubbard*, 15 *Mass.* 96. 15 *Johnson*, 56, *Yelverton*, 47, *n.* *Kent* v. *Walton*, 7 *Wend.* 256.

A owing B a sum of money for a valid consideration, and B owing C a sum on which usurious interest had been paid, it was agreed that A should give his note to C, including the usurious interest, and A was discharged of so much of his debt to B. *Held*, that the note so given by A to C was not void by the statute against usury; the verdict of the jury having negatived any contrivance to evade the statute. *Beaver* v. *Barstow*, 9 *Mass.* 45.

A being justly indebted to B, gave his promissory note for the sum due, agreeing to pay interest thereon at the rate of twelve per cent. per annum. After sundry payments of interest at the rate agreed on, and part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note being in part paid, was also cancelled, and a third note given for the balance. This last note being endorsed, in an action by the endorsee against the promissor, it was holden not to be tainted with the usurious interest paid on the first note, and the endorsee had judgment. *Chadbourn* v. *Watts*, 10 *Mass.* 121.

The agreement of the party to abandon all claims for usury in the setting off the hire of a slave against the interest of money, for the purpose of obtaining possession of the slave again, is nought. 1 *Munroe*, 119.

But an usurious transaction may be cleansed of the usury, and a new contract can be made free from usury, which will be legal and valid, as where the usurious interest is paid up, and upon a renewal of the security, the party refuses to take more than legal interest. 3 *Munroe*, 347. 1 *J. J. Marsh*, 276. 10 *Wheaton*, 367. 3 *J. J. Marsh*, 683.

If a usurious security be given up, and a new security taken for the principal sum due and legal interest, the latter will be good. The moral obligation which the borrower of money at usurious interest is under to pay the principal sum due and legal interest, is a sufficient consideration to support a promise by him to pay such principal and interest. *Kilbourn* v. *Bradley*, 3 *Day*, 356.

If, however, the contract be mutually abandoned, and the securities are cancelled or destroyed, so that they can never be made the foundation of an action, and the borrower *subsequently promises* to pay *the amount actually received* by him, such promise is legal and binding. *Hammond* v. *Hopping*, 13 *Wend.* 505.

A contract usurious in its inception cannot afterwards be rendered valid; so, a note given for a usurious consideration will be void in the hands of a *bona fide* endorsee, without notice of the usury. *Wilkie* v. *Roosevelt*, 3 *J. C.* 206.

A mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. *Tuthill* v. *Davis*, 20 *J. R.* 285.

As where a new note, without any new consideration, is given to take up a note in the hands of the original party to the usurious contract, it is tainted by the original consideration of the first note. *Ibid.*

An assignment of a debt usurious in its inception to a third person, who has knowledge of the original transaction, will not cover it from the scrutiny of the court. *Ibid.* And sufficient ground appearing to support the charge of usury, a reference to a master to take an account, &c., was ordered. *Ibid.*

Where the original loan is usurious, all the securities therefor, however remote or often renewed, are void. *Reid* v. *Smith*, 9 *Cow.* 647.

Where one, as agent, lends money for another, at a usurious rate of interest, and afterwards pays him, and takes security of the borrower in his own name, it is void, though he derive no benefit from the loan, and the premium go to the exclusive benefit of the principal. *Ibid.*

It would be void, even in the hands of a *bona fide* holder. *Ibid.*

A mortgage taken on a loan of money, including a former usurious loan, is void; the taint of *usury* destroys the *whole security*. *Jackson* v. *Packard*, 6 *Wend.* 415.

Where a *usurious note* has been transferred for a valuable consideration, and without notice, and a new note taken by the holder, the *usury* of the first note cannot be set up in bar of a recovery on the second note. *Kent* v. *Walton*, 7 *Wend.* 256.

If money be loaned on a usurious contract, and on maturity of the note it be partially paid, and a new note similar to the former be given for the balance, such new note is void for the usury. And if the borrower be not a party to the usurious note, being neither maker

nor endorser, but the security is such, both as to parties and time of payment, as had been previously agreed between the borrower and lender, the endorser in an action against him, may show the usury in bar of the action. *Warren* v. *Crabtree*, 1 *Greenleaf*, 167.

Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items, the interest as calculated, exceeded six per cent. The receipt for the bill at the foot of the account stated that in case of error either way, should any be discovered, it should be corrected. *Held*, that this was no evidence of a usurious agreement. *Stackell* v. *Etheall*, 3 *Gill & Johnson*, 123.

In pursuance of a corrupt agreement A loaned a sum of money to B and took his note, reserving a usurious interest payable in thirty days, and endorsed by C and D as sureties. When this note became due, it was agreed between C and A, that A should give it up to C, in consideration of which, C would give A his note, payable in ninety days, and endorsed by D. Afterwards, while the first note remained in the hands of C, and the second note in the hands of A, both unpaid, it was corruptly agreed between A, B, and C, upon a usurious consideration, that A should give further day of payment for the amount of the second note, to be secured by D's note payable to C, and endorsed by C to A, in consideration of which, C was to give up the first note to B, and A the second note to C. This arrangement was carried into effect. In an action on the last note in the name of C against D, the defendant pleaded usury, stating these facts, and it was held to be a good defence. *Fields* v. *Goram*, 4 *Day*, 251.

A made his promissory note to B, upon a usurious agreement, B transferred the note to C. In a suit on the note against A, in the name of B, A, with a full knowledge of the transfer, procured and pleaded the release of B, in bar. Whereupon C brought his action against A for the fraud. *Held*, that such action was not sustainable, on the ground that the note was usurious. *Bacon* v. *Norton*, 5 *Day*, 128.

A held a promissory note given by B, on a usurious consideration, and endorsed by C, as his surety. B, being in failing circumstances, C applied to A for the note, that he might secure it out of B's estate, and offered to give A his own note for it, which was agreed to and done. *Held*, that C's note so given was usurious, the transaction being a mere substitution of one security for another by parties to the original usury. And afterwards C obtained payment of B's note by a suit thereon against him, and was thereby fully indemnified; in

consideration of which, he, C, gave a new note to A for the amount. *Held*, that the latter note was not usurious. *Botsford* v. *Sanford*, 2 *Conn.* 276.

Where an instrument, contaminated with usury, is taken up, and a new one substituted by the parties, to secure to the creditor the original debt, the substituted, as well as the original security, is usurious and void. And it makes no difference, whether the party in whose name the substituted security is given, was privy to or ignorant of the original corrupt agreement. *Wales* v. *Webb*, 5 *Conn.* 154.

A, being indebted to B, on a note for usurious interest on former loans, asks for further credit, which B was willing to give, provided he had other security. A proposes to furnish a new note, to be signed by C, (who was endorser of the other note,) payable to D, and endorsed by him in blank, which was received by B in exchange for the former note. In an action upon the last note by E, as endorsee against A, the promissor, there being no evidence tending to show that the plaintiff knew of the origin of the note in suit, or that he was, or was not, a *bona fide* purchaser of it, it was holden, that the note was void by the statute of usury. *Bridge et al* v. *Hubbard*, 15 *Mass.* 96.

Where a creditor of an estate gave up his securities to an executor, who had given bond for the payment of debts and legacies, on the executor's promising to pay him the amount of his debt, and the executor gave his note for the amount, which was avoided for usury, it was *held*, that the giving the note did not extinguish the parol promise, upon which an action might still be maintained. *Stebbins* v. *Smith*, 4 *Pick.* 97.

A note, endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void, as against the maker and endorser, in the hands of an innocent holder, and the fact of the note being a renewal for part of the original contract, being between two of the parties to the original contract, does not vary the case; but where a third person, innocent of the usury, takes a new note, it is valid. *Fleming* v. *Mulligan*, 2 *McCord's R.* 173.

It seems, even if a part of a security be for a valid debt, and part for a usurious transaction, the whole will be infected, and this where separate notes are given. *Ibid.*

In this case the plaintiff had received as endorsee a promissory note of hand, which had been given for a usurious consideration, (without knowledge of the usury,) and had innocently and ignorantly passed the same away to the defendant, and had received from him

another note, on which this suit was brought. It seemed to be the opinion of the court, that this last mentioned note would not be affected by the usurious taint which contaminated the note in place of which it was taken, unless it could be made to appear that the plaintiff had notice of such usurious taint before he took the note in question. *Dickson* v. *Baldwin*, *Brev. Ms. Reports.*

D held a deed of trust of C on land and slaves more than sufficient to satify a debt due from C, but consisting entirely of usurious interest. C and K had also a deed of trust on the same property to secure a debt due from C, but subsequent in point of time to the deed of D. By an arrangement entered into by all the parties, C and K accepted a bill of exchange drawn on them by C in favor of D, on condition that D should enter satisfaction on the record of his deed of trust, which he accordingly did; and C and K sold the property conveyed thereby, and appropriated to the payment in part of their debt due from C. *Held*, that in a suit by D against C and K on their acceptance, they could not set up the usury in the transaction between D and C to defeat the action. *Cook* v. *Dyer*, 3 *Alabama*, 643.

Where a note not tainted with usury has been given up and cancelled on being made the consideration of a usurious contract or note, which latter has been avoided as usurious. *Held*, that the note cancelled on the consideration of this may be recovered, and evidence of the note or consideration be received under the money counts of the declaration. *Edgell* v. *Stanford*, 6 *Vermont*, 551.

Where the maker of a note infected with usury, in consideration that the holder should cancel or discharge the same, promises to give a new note, deducting the usurious excess, such promise will be enforced in law. *McClure* v. *Williams*, 7 *Ver.* 210.

The substance of the foregoing decisions amounts to this: that inasmuch as an actual agreement between borrower and lender, on the one part to pay, and the other part to receive, more than the legal rate of interest, is necessary to constitute usury; so, an actual agreement between the same parties, or their legal representatives, to cleanse the transaction, is also necessary to render any subsequent promise for the payment of the original principal valid. And the legality of the subsequent promise of the borrower rests on the offer of the lender to expel every particle of the original virus from the transaction, and to deliver up all securities therefor, however remote and multiplied, and not, as has been somewhere said, upon the moral obligation of the borrower to pay the original sum received; for, without such proffer

by the lender, any subsequent promise by the borrower is equally void as the first.

Where, however, third persons are mixed up with the new transaction, the courts regard it with a favorable eye. Thus, where a man makes an usurious agreement and gives a bond, and afterwards, by a subsequent agreement, gives a new bond for the sum lent, to *J S*, to whom the lender owes so much, in satisfaction of his debt; this last bond is not voidable by the statute.

Neither, where a stranger has mixed himself up with a security given in consequence, though not in furtherance, of an original usurious security, will the courts interfere in his favor, by allowing him to avail himself of the illegality of the first transaction.

SECTION IV.

Where an usurious contract or security is made after a bona fide contract or security

As a security or contract which is usurious in its inception must always retain its unsoundness, so, on the other hand, when the security or contract has been originally valid, no subsequent taking of, or contract to take, illegal interest will invalidate it; although by such taking the party absolutely incur the penalty of the statute. For, to make a bond, &c., void by the statute, it should appear that it was made for securing illegal interest. 1 *Saunders*, 294.

It is a clear principle, that to defeat a debt or agreement on the ground of usury, the contract must have been usurious at the time the debt or demand was created thereby; for if a demand do not originate in, or accrue from, an usurious bargain, no *subsequent* reservation of illegal interest, or posterior arrangement for a usurious security, will taint or invalidate the original claim; *Tate* v. *Wellings*, 3 *Term. R.* 539; 1 *Saund.* 295, *n.* 1; *Parr* v. *Eliason*, 1 *East* 92; *Phillips* v. *Cockayne*, 3 *Camp.* 119; *Parker* v. *Ramsbottom*, 3 *B. & C.* 257, 270; 5 *D. & R.* 138, 151, *s. c.*; 8 *Mass.* 101, 256; *Phil. Loan Comp.* v. *Turner*, 13 *Conn.* 249; *Johnson* v. *Johnson*, 11 *Mass.* 359; *Swartwout* v. *Payne*, 19 *Johnson* 294; although the *penalty* will be incurred by *taking* usurious interest on such agreement. And it has been held, that if a bond be given for principal and legal interest, the mere proof that usurious interest was subsequently taken, will not establish an original agreement for usury. *Fussit* v. *Brooks*, 2 *C. &*

P. 318. But if at the time of a loan a note be taken as a security for principal and usurious interest, it will be inferred that the money was lent on usurious terms. *Scott* v. *Nichols*, 4 *Day*, 318.

Where a note is given in renewal of a former note, and a *premium*, or interest above *seven per cent.* is exacted for the renewal, the new note is usurious and void, although a separate note was given for the *premium ;* but the old note is not thereby affected or destroyed. *Swartwout* v. *Payne*, 19 *J. R.* 294.

And where a note so made, in renewal of another note on a usurious consideration, was passed by the defendant to the plaintiff, in part payment of the consideration, for the sale and conveyance of land; *held*, that the plaintiff, who had sued the *endorser* of the note, and failed to recover because of the usury, might maintain *assumpsit* for the amount upon the original contract, the note being deemed a nullity. *Ibid.*

If the agreement to pay more than legal interest be subsequent to the time of the loan, though such agreement be usurious, yet it will not avoid the note. *Merrills* v. *Law*, 9 *Cow.* 65.

A note reserving usurious interest is void, though given for a pre-existing valid debt; such debt, however, may be recovered, notwithstanding the invalidity of the security. But where the agreement between parties is usurious, (though such agreement be founded on a good consideration,) it is void. *Rice* v. *Welling et al*, 5 *Wend.* 595.

Where a usurious security is given in part for a *pre-existing valid debt*, such debt is not destroyed by the illegal security. But although a usurious contract contains a good consideration in fact, as where money is actually lent and received by the borrower, yet the security being absolutely void, no action can be maintained upon it, nor is it evidence of indebtedness, upon the strength of which the law will *imply* a promise on the part of the borrower to pay the amount actually received by him. *Hammond* v. *Hopping*, 13 *Wend.* 505.

Where W, who resided at Glenn's Falls, was indebted to H & M of the city of New York, and upon application to W at the place of his residence for payment of the debt, it was agreed between him and H & M, that they should give to him three months for the payment of one half of the debt, and four months for the payment of the other half, upon his securing the debt by bond and mortgage, and that he should, in addition to the legal interest, allow them interest for fifteen days, for the time they estimated that it would take them to obtain the money in the city of New York after it was paid, and the further sum of $20 for the travelling expenses of one of the creditors

who had come to Glenn's Falls to secure the payment of the debt; which $20, and the additional allowance for the fifteen days extra interest, were included in the bond and mortgage: *Held*, that the bond and mortgage were usurious and void, although the debtor voluntarily agreed to pay the half of the expenses of coming to his residence from the city of New York, to collect or secure the debt. *Williams* v. *Hance*, 7 *Paige*, 581.

Where a security which is given on a loan of money is valid at its creation, no subsequent agreement of the borrower to pay an usurious premium for the further forbearance of the loan, will invalidate the original security, or prevent the collection of the money lent with legal interest thereon; but the subsequent agreement for the usurious premium only will be void. And where any usury has been reserved by the lender under such subsequent agreement, it will, in equity, be considered as a payment towards the principal and legal interest due upon the security for the original loan. *Cram* v. *Hubbell*, 7 *Paige*, 413.

Where the purchaser of land, under a contract payable by instalments, had paid the principal part of the purchase money, but being unable to pay a portion of the last instalment which had become due, applied to the vender for an extension of the time of payment for a few months, which the vendor refused, unless the purchaser would consent to repurchase the land and pay therefor $300, in addition to the $710 due upon the contract, and the vendor thereupon gave a deed for the land, and took back a bond and mortgage for the whole amount due, including the $300 and interest: *Held*, that the pretended resale was a mere cover for obtaining more than legal interest for the forbearance of the payment of the $710, and that the bond and mortgage were therefore usurious and void. *Held, also*, that the bond and mortgage being void for usury, the original debt was not merged therein, but remained an equitable lien upon the land as a part of the purchase money due upon the first contract. *Crippin* v. *Hermance*, 9 *Paige*, 211.

A owes B $5000, and when it becomes due, it is agreed that A shall endorse notes on different individuals not yet due, to B, in payment thereof, and deduct four per cent. a month for the time the notes had to run, and also procure another endorser, which was accordingly done. *Held*, that this transaction was usurious, and that the subsequent endorser could take advantage of it. *Martin & Yerger*, 392. 1 *Yerger*, 243, 444.

If a note bearing interest be given for a debt due, the creditor may

waive proceeding or claiming under the note, and recover on the previous debt. *Depaw* v. *Humphreys*, 8 *L. N. S.* 2, or 20 *Martin*. But if the original contract be for a legal rate, and this be afterwards extended to an illegal rate, the second contract being null does not avoid the first, which remains good. *Daquin et al* v. *Cairon*, 3 *L. R.* 409.

Where at the making of a promissory note bearing lawful interest from its date, an extra premium was also paid, the note was held to be usurious and void. *Thompson's Exec.* v. *Thompson*, 8 *Mass.* 135.

A owing B a sum of money, gave his promissory note payable in six months in a specific commodity at a lower rate than its current value; the note not being paid at the time it fell due, the creditor put it in suit, and afterwards adjusted the suit by taking a new note for the balance of the former, at the low rate of the commodity, and made the new note also payable at a given day in a specific commodity at a lower rate than its current value. This last note was held to be usurious and void. *Cullen* v. *Johnson*, 8 *Mass.* 266.

A, being a co-surety with B, and having himself paid the debt, B, at his request, gave his negotiable promissory note to C, a stranger, in which usurious interest was included. C endorsed the note to A, and in an action by him against B, the note was avoided on account of the usury. It was holden that B was still answerable to A in an action upon the original implied promise. *Johnson* v. *Johnson*, 11 *Mass.* 359.

Defendant owed plaintiff a certain sum of money; but on the day of payment, not having the money, he agreed with plaintiff to give him more than six per cent. for indulgence; a bond was given for the principal sum, and the amount above the legal interest was paid partly in money and partly by a note. An action being brought on the bond, it was *held*, that the transaction was usurious and the bond void. The act against usury cannot be evaded by taking two securities, one for principal and another for the unlawful premium. *Glisson* v. *Newton's Exec.*, 1 *Hay.* 336.

Where A had judgment and execution against B, and on the day of sale consented to indulge B in consideration of a sum more than legal interest for the time of indulgence, and this sum was paid: *Held*, that this was usurious, and A was liable to an action for the penalty under the statute against usury. *Curtis* v. *Brund*, *Conf. R.* 28.

Where a person gave a note for $500 for a valuable consideration, payable sixty days after date, and when it became due, in order to obtain the further time of sixty days, gave his duebill for $50, and a new note for $500, payable sixty days after date; the court held the

transaction usurious, and that the note of $500, as well as the note of $50, was void under the statute. But had the original note been retained at the time of giving the last notes, such original note had been valid; but having been given up, the original debt was merged in the last computation. (*Quere, as to the last.*) *Motte* v. *Dorrill*, 1 *McCord R.* 350.

Defendant's property being taken in execution at the suit of A B for $1400, defendant, in order to obtain one month's stay of sale, agreed to pay $100, and gave the note on which the action was brought to plaintiff, to whom A B was indebted, plaintiff crediting A B with the amount, and he guaranteeing the payment of the note to plaintiff. *Held*, that the note was usurious and void. *Cleveland* v. *Dove*, 1 *Harp. R.* 407.

Where a note on a legal consideration is drawn to order and endorsed, no matter how often it has been polluted in the hands of intermediate holders, it is still valid in the hands of a *bona fide* holder *King & Jones* v. *Johnson*, 3 *McCord R.* 365.

The plaintiff sold a parcel of cotton to the defendant's intestate on a credit, and took his note for the amount, but surrendered it when it came to maturity on receiving a new note for the amount, with the addition of usurious interest, for which he stipulated as the condition of further indulgence, and in an action against the defendant on the new note, was defeated on the plea of usury. *Held*, that he was nevertheless entitled to recover in a new action for the price of the cotton. *Chartain* v. *Johnson*, 2 *Bailey*, 574.

A *bona fide* debt or demand contracted upon a legal consideration, is not lost or destroyed by being mingled with a usurious transaction, or being made in whole or in part the consideration of a usurious contract. *Edgell* v. *Stanford*, 6 *Vermont*, 551.

If a bond for usurious interest be taken in consideration of forbearance to bring suit on a previous bond, which in its origin was free from objection, it is competent for the obligor to obtain relief in equity against the obligee, by having such usurious bond cancelled, or credit given him for the amount of the principal and interest due thereon, against the original bond, *and this right is not lost by the assignment of either of the bonds.* *Fox* v. *Taliaferri*, 4 *Munf.* 243.

A, being indebted by bond to B in £445 11*s.* 2*d.* sterling, on the 17th Dec. 1787, assigns him C's bond for £780 currency, at the agreed value of £382 1*s.* 2*d.* sterling, and gives him a new bond with two sureties for the balance of £106 17*s.* 2*d.* sterling, payable in March following. This is usury.

In such case it is sufficient if the verdict finds facts amounting to usury, though it does not find the corrupt agreement in technical words. *Gibson* v. *Trutoe*, 1 *Call's R.* 54.

Where the principal failed, and his sureties obtained indulgence from his creditor, by agreeing to pay ten per cent. per annum, which they did, and then took the note of their principal for repayment, including the ten per cent. paid by them, this last note was held to be usurious. *Martin et al* v. *Legrand*, 2 *Little*, 327.

SECTION V.

Where there is a bond to indemnify a surety.

The statutes against usury declare void all bills, bonds, &c., whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value for the *loan* or *forbearance* of any money, &c.

A bond, therefore, given to indemnify a surety of the borrower who is not privy to the usurious contract, is not within the act, and may be recovered on, although it reserve more than the legal rate of interest. 2 *Leon.* 166. But it seems that if the surety of a borrower at usurious interest have an opportunity to make his defence in a suit upon the original usurious bond and omit to plead, he cannot afterwards recover of the borrower upon his counter bond of indemnity, but shall be punished for his neglect. *Potkin's case*, 8 *Leonard*, 63. And upon an action brought upon a bond by which the defendant was bound to save the plaintiff harmless, in consideration of his having become the defendant's surety in a bond to one Preston, which had been entered into upon an usurious agreement; and the plaintiff, having been sued upon the original bond, now brought his action on the counter bond against the defendant, who pleaded the statute of usury. This was held no plea, for it was not for money *lent*, but to indemnify a surety; and the defendant had not saved his surety harmless, and the reason given was, that the surety might not have known of the original contract being usurious in time to make his defence. *Croke Eliz.* 588.

Justice Glanville said it would be a dangerous precedent to avoid the statute, for the surety might be a friend of the usurer's, who would not plead the statute, and so the statute would be to little purpose. *Noy*, 73.

This principle has been followed in the United States.

John Nichols v. *Corset.* Action of ejectment for land. The plaintiff's title was a deed from his father, George Nichols, dated 13th Dec. 1784. The defendant pleaded that said deed was a mortgage defeasible upon said George's paying a certain sum of money, that it was executed at Waterbury in said New Haven county, and that there was reserved by said deed interest at the rate of seven per cent., which is more than the lawful interest at the rate of six per cent. per annum; by the corrupt agreement of said parties, and by force of the statute entitled an act for restraining the taking of excessive usury, it is void.

The plaintiff traversed the deed's reserving more than lawful interest; upon which the parties were at issue to the jury.

The facts upon the evidence were, that said George Nichols was indebted to the Messrs. Rays in New York by obligation which bore an interest of seven per cent., the lawful interest of New York, that he was pressed for the debt, and that the plaintiff took him off, and gave his own security to them for said debt in New York, payable with the lawful interest of New York, and at Waterbury took a bond and mortgage of said George for the same sum and lawful interest of New York, and gave back to his father, said George, a writing, that upon his paying him a certain sum, less than the original debt and the interest of that sum, at seven per cent., he would give up said mortgage.

By Court and Jury.—This deed was not usurious within the statute, for although seven per cent. is expressed in the mortgage, and the mortgage was given in this state, where six per cent. is the lawful interest only, yet this is a security to pay the plaintiff only what he was lawfully bound to pay for said George in New York. 1 *Root*, 294.

A surety is entitled to indemnity, even if he satisfies a usurious contract, and the mortgage was in substance a contract to indemnify the son.

A signed a note as surety for O, payable to H; and O, in order to secure A for becoming his surety, gave him an absolute bill of sale of a chaise, then in possession of a third person, and of some other property in the possession of O. The whole was left in the same situation as before, no actual delivery or change of possession being made, except that notice of the transfer of the property to A was given to the person holding the chaise, and he agreed to keep it for A. Afterwards the chaise was seized and taken away on an execution in favor of a creditor of O, and A took it from the possession of

the officer. In an action of trespass brought by the officer against A or the chaise, it was held, that although the note on which A had become surety, might be usurious and void, yet he was entitled to hold the property assigned to him for his security, until he was indemnified or relieved from the note. That the fact of part of the property being suffered to remain in the possession of the vendor, did not defeat the vendee as to the residue, unless the transaction was fraudulent in fact. That the jury were the proper judges, whether, from all the circumstances in the case, the sale was merely colorable and made to defeat the right of creditors, or was fair and *bona fide*. *Spalding* v. *Austen*, 2 *Ver*. 555.

A note was drawn payable to A and B, which was held by C, who wished to sell the note to D, who refused to take it unless it was endorsed by A and B, and A refused to endorse it unless he received security for his indemnification, which it was agreed to give, and the note was sold to D at a discount of twenty per cent., it being understood between B and C, that part of the money raised by the sale of the note, should be lent to B. B drew a note payable to C, or bearer, for the amount actually received by him from C, with an addition of twenty per cent. on the amount, and interest thereon from the date, which last mentioned note was deposited with A as his security. In an action by A against B on this note, *held*, that it was usurious and void. *Yordan* v. *Hess*, 13 *J. R.* 492.

Where R was applied to by P for a loan of money, but not having it, referred P to his son-in-law, whose usage he said it was to receive seven per cent., besides legal interest, and by an arrangement between himself and P, received P's note with an endorser, and procured the money of his son-in-law at the rate mentioned by him, on his own note which he afterwards paid, and gave P credit from time to time on P's successive endorsed notes, holden by R himself: *Held*, that R must be considered the lender, that he did not stand in the light of a mere surety of P, and that the note taken by him was void. *Reed* v. *Smith*, 9 *Cowen*, 647.

Whether a surety, knowingly becoming bound for and paying a usurious loan, may recover over against his principal? *Quere*. *Ibid.*

A, being indebted to B by bond, was arrested in New York, and to secure the bond made a mortgage of land in this state (*Connecticut*) to B, after which C paid the bond and took an assignment of the mortgage: *Held*, that A could not redeem without paying to C the sum actually advanced by him, *and seven per cent. interest*. *Per Curiam*. We admit the rule to be that the assignees of a mortgage,

purchasing without the concurrence of the mortgagor, shall relinquish it upon payment of the original debt and simple interest. But if the purchase be made at the request of the mortgagor, interest shall be turned into principal; such is the rule laid down in *Ashenhurst* v. *James*, 2 *Atkins*, 371; *Mallory* v. *Aspinwall*, 2 *Day*, 280.

A, having given a usurious security, paid the amount thereof to B, who was surety for him, and B, in consequence of such payment, gave his own note to the creditor for the same amount. *Held*, that the latter note was given on a new consideration, and was uninfected with usury. *Scott* v. *Lewis*, 2 *Conn.* 132.

A pure contract of indemnity against a doubtful claim, is not within the statute against usury; but an agreement whereby the borrower agrees to pay the lender the same rate of interest which the latter is bound to pay a third person, and which exceeds the legal rate, is not a contract of indemnity within the meaning of the rule, and this whether the obligation of the lender be created by law or by stipulation. *Dowell* v. *Vannoy*, 3 *Dev.* 43.

A judgment is recovered against a principal and surety. Upon an agreement then, the surety signs the replevin bond, and the principal gives him a note, which includes the full amount of the replevin bond, *with about thirty per cent. added to it*, and the surety agrees in writing to credit the note with the same amount, provided the principal pays the replevin bond himself. They agree in the pleadings that the arrangement was intended not merely to have the effect of a penal bond, but as an indemnity to the surety in case the payment of the replevin bond should devolve on him. *Held*, that this contract is but an agreement for a loan of money in a certain contingency at a future day, upon an agreement that more than six per cent. should be paid for the loan, and is usurious. The surety may enforce a judgment he has on the note, to the amount actually paid by him in discharge of the replevin bond, with legal interest from the time when he paid it. From the balance the principal is relieved in equity. *Moore's Executors* v. *Vance*, 3 *Dana*, 362.

CHAPTER IV.

OF THE AVOIDANCE OF, AND RELIEF AGAINST, USURIOUS CONTRACTS AND SECURITIES.

SECTION I.

Who may set up the defence of usury.

ALTHOUGH the statute declares utterly void all usurious contracts and securities whatever that may be tainted with it, the borrower may nevertheless, where others are not implicated with him, elect to waive the defence and confirm the contract, or expressly charge the property subject to the usurious lien, by selling it subject to the payment of the usurious incumbrance, and set up the defence in personam as to himself. Hence no person, unless legally implicated in the usurious contract, or having a legal interest in the property subject to such charge, can interfere with the contract by interposing the defence. But if the borrower make an unqualified sale of the property incumbered by the usurious security, he has parted with the power to confirm the security, as to such property, though he may waive the defence as to himself, and the purchaser in such case may plead the statute as to the property. 9 *Paige*, 139.

This exception to the invalidity of the usurious contract arises not from the statute against usury itself, but upon general principles which prohibit a mere stranger from interfering with the contracts of others.

To determine, therefore, who may set up the defence of usury, it will be necessary to ascertain whether any lawful right in or lien upon the subject matter of the contract exist in the party claiming to set up the defence, independent of the usurious contract or security tainted with it; or whether such party would be legally liable to prejudice or injury by the enforcement of such contract if it were not usurious, and if not, he will not be permitted to plead the statute; for the usurer or his representatives in such case have equal equity, and by the election of the borrower to confirm the contract, a paramount right.

A surety of the borrower in the usurious contract is entitled to the defence. 11 *Wendell*, 329.

Bail of the borrower to the action may plead the usury. 12 *Mod.* 493.

And also a joint obligor. 5 *Coke*, 119.

A judgment creditor having acquired a legal lien upon the property incumbered by the usurious security, may plead the statute, whether the borrower join in the defence or not. 8 *Paige*, 639.

Privies in blood, as the heirs of the borrower.

Privies in representation, as executor or administrator of the borrower. 16 *Mass.* 118.

Privies in law, as the assignee in bankruptcy or sheriff in execution, and privies in estate may avail themselves of the defence of usury. 2 *Hill*, 525; 14 *Johnson*, 435.

A party who is the direct assignee in trust of a mortgagor, may impeach the mortgage for usury; such assignee stands in the place of the mortgagor and has his rights. *Pearsall* v. *Kingsland*, 3 *Edw.* 195.

The owner of the premises against which a usurious mortgage is attempted to be enforced in a court of chancery, must himself set up the defence of usury in his answer. He cannot avail himself of a defence set up in the answer of the co-defendant from whom he purchased, who has no interest in or lien upon the mortgaged premises, and who is not a necessary party to the suit. 4 *Paige*, 526.

One Scofield granted to William S. Moore an annuity to issue from four houses and lots in Alexandria, and covenanted that the same should be paid to M. forever thereafter. In the deed granting the rent charge, M. the grantee covenanted, that at any time after five years on the payment of $5000 with all arrears of rent, he would release the rent charge and the same should cease. S. covenanted to keep the buildings in repair, and have them insured against fire, and assign the policy to M., the money from the insurance to be applied to rebuilding or repairing the houses if destroyed or injured by fire.

Afterwards S. by deed of bargain and sale conveyed to Lloyd the houses and lots of ground, subject to the payment of the rent to M. The rent being unpaid, M. levied a distress for the same, and Lloyd brought a replevin. Moore avowed the taking, stating the rent charge and arrears of rent, to which Lloyd pleaded usury and defendant demurred to pleas, and *per curiam*. The principle seems to be settled that usurious securities are not only void as between the original parties, but the illegality of their inception affects them even in the hands of third persons, who are entire strangers to the transac-

tions. A stranger must take heed to his assurance at his peril, and cannot insist on his ignorance of the corrupt contract in support of his claim, to recover upon a security which originated in usury. In the case of *De Wolf* v. *Johnson*, 10 *Wheaton*, 367, the first mortgage being executed in Rhode Island in 1815, was not usurious by the laws of that state, and the second mortgage executed in Kentucky in 1817, being a new contract, was not tainted with usury. The question whether the purchaser of an equity of redemption can show usury in the mortgage to defeat a foreclosure was not involved in that case. The law of Virginia having declared that a contract infected with usury is void, and by the deed from S. to M. a right to enter on the premises and distrain for rent is claimed under a deed, which upon the admissions in the pleadings is usurious; the premises upon which the distress was made being held by L. under a conveyance from S., L. may set up the defence of usury in the deed against the summary remedy asserted by M. under the deed. 4 *Peters*, 205.

Where the plaintiff was sued at law upon notes alleged by him to be usurious, and suffered a verdict and judgment to be taken against him without making any defence, or applying to chancery for a bill of discovery: *Held*, that he was concluded, and not entitled to relief in that court.

An assignment of a debt, usurious in its inception, to a third person, who has knowledge of the original transaction, will not cover it from the scrutiny of the court. And sufficient ground appearing to support the charge of usury, a reference to a master to take an account, &c., was ordered. 17 *Johnson R.* 436.

In *Green* v. *Kemp*, (13 Mass. R. 515,) the demandant claimed under a mortgage to himself from Isaac Woods in 1808. Two years afterwards, Woods conveyed the "equity of redeeming" the land to the defendant. The court would not permit the defendant to set up usury in the mortgage, for the reason that he had *no title* to the land, having only purchased the *right to redeem*, of which he had not thought proper to avail himself. It was admitted that if he had purchased the land, though with notice of the mortgage, he might have set up the usury.

See also, case of Trumboo, Exec. of Niff *v.* Blizzard & Jacobs. 6 *Gill & Johnson*, 18.

A mortgages lands to B, upon a usurious contract for £100, and before the day of payment, B is ousted by C, against whom B brings an action. C cannot to such action plead the statute of usury, for he has no title. *Per Periam, Justice, in Carter and Claypole's case*, 1 *Leon.* 307.

SECTION II.

How usury must be pleaded at law.

In assumpsit usury may be given in evidence under the general issue.

And if it appear upon the face of the plaintiff's declaration, that the contract is void for usury, he shall not be permitted to recover. *Comyn*, 202.

But this can seldom be the case, as every ingredient of the offence would not be set up by the plaintiff. And it would seem that, in an action purely legal, where the plaintiff must substantiate his claim through an instrument, agreement, or deposit, infected with usury, any defendant other than the original and primary debtor may defeat the claim by evidence of usury under the general issue. And it seems that a defendant sheriff in replevin may, under a plea of *non cepit*, or *non detinet*, give evidence of usury in the bond and mortgage under which the plaintiff claims, and thus defeat the action. *Dix* v. *Van Wyck*, 2 *Hill*, 522.

A subsequent grantee, lessee, or other legal possessor of land, may defend an action of ejectment, or writ of entry, brought upon a prior usurious instrument, without being put to his special plea, as he may be unacquainted with all the necessary facts for that purpose, but he may give the usury in evidence under an issue of *nul disseisin* or *non ouster* in ejectment. *Hills* v. *Elliott*, 12 *Mass.* 26.

The principle of this would seem to be, that any person holding under a lawful title of the oppressed borrower prior to action brought, is entitled to his day in court; and the fact of his not being fully acquainted with the necessary facts to constitute a plea of usury, shall not be permitted to deprive him of a lawful defence, where the land is not expressly charged with the payment of the usurious loan.

In actions of debt on specialty against the obligor, the usury must be specially pleaded, he being cognizant of all the material facts constituting the offence, each of which must be distinctly and positively alleged, in order to give the plaintiff an opportunity to reply and explain, and upon issue joined every allegation of the pleader must be positively proved precisely as laid, or it will not be the usury set up as a defence, and any material variance will be fatal. Every presumption is against the pleader, and a mispleading cannot be

amended, or a default opened, but upon terms of waiving the forfeiture.

As to what facts are material to be averred in a plea of usury. *First.* The parties to the contract—or the plaintiff might reply he was innocent of the usury. *Second.* The time when and where it was entered into—or the plaintiff might reply, the contract was made previous to the operation of the act, or made in a foreign state not subject to the act. *Third.* Where the loan was actually made, or the debt became due that was contracted to be forborne, and to whom owing—else the plaintiff might reply, that the advance was made, or debt forborne, became due in a country different from the place of contract and subject to the law of the place of performance. *Fourth.* For what length of time the debt was to be forborne—or the plaintiff might reply, that interest was included from a date previous to the date of the bond. *Fifth.* The true amount of the debt, the legal rate of interest, and the excess over legal interest, agreed to be paid in violation of the statute, and that the usurious premium was upon the consideration of forbearance, and giving day of payment; for if the plaintiff can show a good consideration, the law will sustain him. The statute violated must be referred to, but need not be recited, unless it be a foreign statute, when it must be recited with the enacting clause and when it went into operation, and that it has not been repealed, for the court cannot judicially know a foreign law, and the plea must state the contract was made with reference to such foreign law, or that the advance was made within the operation of such law.

The plea must allege, that the defendant was indebted to the plaintiff at the time the bond was given, or that there was an agreement to lend money or other thing upon the usurious contract. And it must be alleged, that the bond was given for the payment of the usurious interest.

Where there is a direct negotiation for a loan of money, or other thing, and more than the legal rate of interest is contracted to be given and taken, the intention of the parties is of no consequence; in such case, whether they intend to violate the law or not, the contract is invalid, if they do violate it. But if it was agreed to disguise the transaction under cover of any device, whatever it may be, the technical allegation of "*quod corrupte agreatum fuit,*" is material and necessary; and all the circumstances constituting the disguise must be set out, in order that the court may judge whether such alleged

disguise is, in fact, a cover for usury, or a lawful agreement, that the law will sustain and enforce. For if the entire agreement will admit of a twofold construction, one legal and the other illegal, the court will adopt the legal construction.

A plea of usury, therefore, should, on its face, either present such facts with certainty to every intent, as in themselves distinctly amount to an agreement to receive more than the value of legal interest, or it must state the facts with such necessary averments of intent to evade the statute, as that a jury upon the trial might decide that the agreement was in substance a contract for usurious interest, and a shift to evade the operation of the law. *Per Brockenbrough, Justice.*

We have thus far spoken of the plea as a defence, but neither the borrower or his legal privities are obliged to await the attack of the lender, but may invoke the law in the first instance for relief from any usurious security.

Trover may be maintained against an usurious bailee, after demand and refusal, without offering or tendering the principal sum, or any part thereof, as the action is strictly legal and the deposit void. 2 *Adolphus & Ellis*, 12. 4 *Barnwell & Alderson*, 92. 7 *Bingham*, 97. 16 *Wendell*, 574.

Replevin may be maintained by a tenant of the mortgagor for a pretended distress, where the title of the party distraining is made through an usurious mortgage or other instrument. *Loyd* v. *Scott*, 4 *Peters*, 205. And also for goods, notes, or other things transferred usuriously generally, after demand and refusal, without tender or offer to pay the principal money or thing loaned. 20 *Wendell*, 234, *Boughton* v. *Bruce*. And even after a statutory foreclosure and purchase of the mortgaged premises by the mortgagee or other person having knowledge of the usury, a subsequent purchaser of the mortgagor may maintain ejectment against the possessor under the usurious title. *Jackson* v. *Dominick*, 14 *Johnson*, 435. But if the purchaser be a stranger to the usury, his title becomes perfect under such statutory foreclosure, as against any subsequent claimant under the borrower. *Jackson ex dem. Babbitt*, v. *Henry*, 10 *Johnson*, 185.

But assumpsit is an equitable action, and the borrower in that can recover back only the excess paid over principal and legal interest, and this independent of the act against usury; but if the popular action given by the statute be proceeded in by a stranger, the right of the borrower to recover is gone. And if such popular action given by the statute is not proceeded in by a stranger, the borrower's right to

recover back the excess continues, subject only to the general limitation of actions at law. 6 *John. C. R.* 95. *See R. S. and act of* 1837.

But money which has been recovered and collected at law in a suit upon a usurious security, in which suit there was a legal defence, cannot be recovered back from the plaintiff in such suit, either at law or in equity. *Bartholomew* v. *Yaw*, 9 *Paige*, 165.

Usury may be *pleaded* to an action upon the corrupt contract or security, but to a *scire facias* on a judgment confessed, usury is no plea. For the statute only extends to bonds, contracts, and assurances, and cannot extend to a judgment, especially as it was competent to the defendant to have pleaded the usury to the original action, and not to have suffered judgment, which, instead of a contract or assurance, is *redditum in invitum*. *Middleton* v. *Hill*, *Croke Eliz.* 588.

But the usury may be got at on a motion to vacate the judgment, which practice is confirmed in England as the proper mode of proceeding, and upon a rule to show cause why the judgment entered upon a bond and warrant of attorney given by the defendant, should not be set aside, and why the proceedings in the *scire facias* should not be stayed on the ground that the consideration upon which the warrant of attorney had been obtained, was corrupt and usurious, the Court directed an issue to try, whether or no the contract were usurious, and in the mean time ordered the rule to be enlarged *Cock* v. *Jones*, *Cowper*, 727.

In New York a judgment by confession on bond and warrant of attorney set aside for usury, the usury being sworn to by the defendant, and not directly and positively denied by the plaintiff. *Lansing* v. *McKulley*, 1 *Cowen*, 35. The practice is there referred to.

To a plea of usury the plaintiff may reply, *quod non corrupte agreatum fuit*, or *quod licite barganizavit*, or that it was for a lawful debt, with a traverse of the corrupt agreement. And he need not show in his replication how much the debt was. *Villars* v. *Cary*, 6 *Mod.* 303.

And he may traverse the agreement *modo et forma*, without traversing it as the *corrupt* agreement. *Cock* v. *Radcliff*, *Cas. temp. Hard.* 287.

Where the defendant pleads *quod corrupte, &c.*, and the plaintiff replies that it was *pro vero et justo debito*, and traverses the corrupt agreement, he must conclude with a verification, *et hoc paratus est verificare*, and not to the country. *Baynham* v. *Matthews*, *Fitzgib.* 130. But the usual and better way is, to conclude to the country

without any traverse. *Hedges* v. *Sandon*, 2 *Term Rep.* 439, 1 *Saund.* 103, *n.* 1.

Where the defendant had pleaded the statute by a wrong date and title, and the plaintiff, by his replication, had admitted the existence of such a statute, the court, nevertheless, awarded a repleader. *Loze* v. *Walton*, *Croke Eliz.* 245. 1 *Vern.* 110.

But the general doctrine is, that the court will allow no amendments on the part of a defendant pleading usury, but upon the terms of waiving the forfeiture and submitting to pay the principal and legal interest. 3 *Murphy*, 237.

And where in debt on bond, the plaintiff declared that the bond was made in London, and the defendant pleaded that the bond was given for an usurious contract made at D. in Staffordshire, which the plaintiff traversed, and the issue was tried in the county of Stafford; it was moved in arrest of judgment, that the trial should have been in London. But the court thought the trial right, and mentioned two cases where the like proceeding had occurred. *Kinnersley* v. *Smart*, 1 *Leon.* 48. *Croke Eliz.* 195.

And it seems that where an action is brought upon an usurious security, which has been given for a debt originally valid, if the defendant prove the security void, the Court will permit the plaintiff to fall back on the original consideration and recover. *See case of Depau* v. *Humphreys*, 20 *Martin*, 1.

The doctrine that a borrower of money at usurious interest, is in *pari delicto* with the lender, has long since exploded, and with regard to parties becoming *participes criminis*, the following distinction is laid down, viz., between the prohibition of statutes made to protect weak and necessitous persons from being overreached or oppressed, and the prohibition of statutes enacted upon general reasons of policy and public expediency; the rule is, in the latter case all parties are equally criminal; in the former, the oppressor is alone within the pale of the law. *Per Lord Mansfield in Clark* v. *Shee*, *Cowper*, 200. And this has been recognized and acted upon in most of the subsequent cases. *Doug.* 696. 3 *Term Rep.* 25. 6 *East* 241. *Cowper*, 790.

SECTION III.

Of the evidence of usury.

Upon the plea of usury, the proof lies all upon the defendant. In an action against the acceptor of a bill, accepted for the accommoda-

tion of the drawer, the drawer is not a competent witness to prove that the holder came by the bill on an usurious consideration; because he does not stand indifferently liable to the holder and the acceptor. *Jones* v. *Brooke*, 4 *Taunt.* 464.

It has also been holden by Lord Kenyon, that an attorney who prepares deeds which are granted on an usurious consideration, may be examined by the defendant to prove the usury; and that his privilege of confidence will not extend to the original formation of the deeds upon which the action was brought. *Board* v. *Ackerman*, 5 *Esp. N. P. C.* 119.

And in action by the endorsee against the maker of a promissory note, where usury was set up as a defence, Lord Ellenborough admitted in evidence letters from the payee to the maker, stating the usurious consideration between them; it having been shown that the letters were written at the same time with the making of the note. *Kent* v. *Lowen*, 1 *Camp.* 177.

A demurrer, on the ground of usury, cannot be sustained. 3 *Marsh*, 174.

But that which appears need not be proved. 2 *J. J. Marsh*, 428.

But evidence of usury without being charged will not answer; for we have before seen that it must be pleaded. 3 *Marsh*, 391. 3 *Conn.* 266.

But if facts are set forth and pleaded, which necessarily constitute usury, it is unnecessary to charge such facts as being usurious. 5 *Monroe*, 467. 6 *Monroe*, 81. 7 *Monroe*, 263.

And parol evidence is admissible to prove a written contract usurious. 3 *Marsh*, 419.

Receipt of interest is evidence of a loan. 3 *J. J. Marsh*, 694.

Foreign laws must be proved as alleged. 3 *Dana*, 497.

In Kentucky, *it seems*, a surety cannot plead usury without the consent of the debtor. 4 *Dana*, 181.

A party to an usurious note, divested of his interest, is a competent witness. 1 *Conn.* 260.

Parol evidence of usury in ejectment is competent testimony, and may be given without notice. 4 *Conn.* 436.

And to impeach a deed. 5 *Day*, 100.

Complainant's bill itself may prove the truth of the defendant's plea of usury. 6 *Randolph*, 661.

If the debt be just, a bond given for it may be usurious. 6 *Mod.* 303. 12 *Mod.* 385. 3 *Bos. & Pul.* 159.

An answer need not set up usury with the formal strictness of a plea at law. 8 *Leigh*, 330.

It is usury if more than lawful interest be proved to have been taken, though the parties be ignorant of the law. 1 *Stewart*, 442.

A note given for a compromise is good, though more than lawful interest be taken. 2 *Stewart*, 63.

The declaration of a person, for whose accommodation the note is taken, is not evidence. 1 *Porter*, 57.

In the absence of legal proof of a foreign law, the law of the forum will prevail. 12 *L. R.* 594. 6 *L. R.* 557.

Facts, without charge of usury, may be construed as usury, 7 *Yerger*, 545.

Where a usurious security is utterly void, it is no evidence of a previous indebtedness. 13 *Wend.* 545.

Under the New York Act of 1837, the personal attendance of the plaintiff is necessary. 20 *Wend.*, 611. See also 24 *Wend.* 360.

For the notice requisite under the act of 1837, see 3 *Hill*, 564.

It seems a general notice is not sufficient. And no order for the plaintiff to be examined is necessary. 4 *Hill*, 35. Plaintiff may be compelled by subpœna to attend. 4 *Hill*, 119.

The general rule established by the American cases appears to be, that a party to a negotiable note shall not be admitted to prove it to be usurious. Upon the history of this rule the American Jurist (No. VII. p. 140) has these observations: "It is well known that the rule was first introduced in England in 1796, in the case of *Walton* v. *Shelly*, 1 *Term R.* 296. In 1798 the rule, which notwithstanding that case had never been firmly established in England, was abandoned. See *Jordaine* v. *Lashbuck*, 7 *T. R.* 601. And it has ever since been held in that country, that a party to a negotiable instrument, if not interested, may be a witness to impeach its validity. In most of the states, however, which have decisions on the subject, the rule adopted in *Walton* v. *Shelly* has been adhered to. In Connecticut the rule has been thrown off; and, if we may judge from some expressions used in the Supreme Court of New York, it is questionable, although it has been so long and so firmly established, whether it will be long permitted to maintain its ground in that state." Some exceptions have been made to the rule in some of the states The exceptions are not all of them established in all the states in which the rule is admitted. One of them is, that when the plaintiff himself is a party to the illegal concoction of the note, a party to the note, if not interested, may prove that it was void in its original formation. *See Powell* v.

Waters, 17 *Johns.* 76. *S. C. in Error*, 8 *Cowen*, 669. *Also* 18 *Johns.* 167. 20 *Johns.* 287. 16 *Mass.* 118.

But it must be admitted that the Courts of New York and Massachusetts have not always recognized this exception. 14 *Johns.* 270. 10 *Mass.* 502. 4 *Mass.* 156. See 2 *Phillips' Ev.* (*Cowen and Hill's edition*) 71–81. 3 *Pick.* 184. 6 *Peters*, 51. 6 *Mass.* 449. 7 *Mass.* 199. 17 *Mass.* 122. 5 *Cowen*, 23. 5 *Cowen*, 153. 4 *Harris & Johns.* 283.

But in an action by the plaintiff against the payee of a note, which was endorsed for the accommodation of the maker by the payee, the maker, being released by the defendant, was held to be a competent witness to prove the usury. *Van Scaick* v. *Stafford*, 12 *Pick.* 565.

The arguments in favor of the rule are stated in the last mentioned case by *Parsons, C. J.*

In the recent case of *Chandler* v. *Morton*, 5 *Greenl.* 374, in the Supreme Court of Maine, it was adjudged that the rule, that a party to a negotiable note shall not be admitted to prove it usurious, extends to the maker of an accommodation note, and is applied even where the note had been delivered up to the creditor for the amount; and that its application is not restricted to the case of an innocent endorsee; but is admitted where the usurer himself is a party. *See Dane's Abridg.* 345 *et seq.*

In the case of *Hunt* v. *Edwards*, 4 *Harris & Johns.* 283, in the Court of Appeals in Maryland, it was held that the maker of a note is a competent witness in an action on it by the holder against the payee, to prove that the note was given on an usurious consideration.

In the case of *Griffith* v. *Reford*, 1 *Rawle*, 196, in the Supreme Court of Pennsylvania, it was determined, that in an action against the endorser of a promissory note, the maker, to whom the defendant had executed a release, is not incompetent as a witness for the defendant on the ground of interest, though he has given him a judgment and mortgage to secure him against the endorsement. But that he is incompetent (on the ground that a witness cannot impeach a writing he has given) to prove that the consideration of the note was usurious; that the endorser was in fact the lender, and that the security was put into a negotiable form merely for the sake of convenience. *Huston and Todd, J., dissenting.* It has been decided in the same state, that on the trial of a *scire facias* upon a judgment, evidence is not admissible on the part of the defendant to show that the bond upon which the original judgment was entered by warrant of attorney was usurious in its foundation. *Lyle* v. *Williams*, 15 *Serg. & Rawle*, 135. It is to be

recollected, however, that usury does not in that state render a security null and void, in toto, as it does in some others. But in England, where it does vacate a contract, it is not pleadable to a *scire facias*. *Bush* v. *Gowen*, 2 *Strang*, 1043. *Cook* v. *Jones*, *Cowp.* 727.

It has been ruled in the state of Vermont, that it is incorrect to exclude from the jury evidence of the taking even a trifling sum above legal interest, when the defence is usury. Whether taken corruptly, or by mistake, should be left to the jury. *Bank of Burlington* v. *Durkee*, 1 *Verm.* 399.

The testimony of a general practice of taking interest at banks, according to printed tables, not exactly correct, and that such practice has existed a long time without being resisted, is proper; and may be conclusive to show that the extra interest was not taken corruptly. *Ibid.* And that the receiving of interest, according to the uniform custom of banks, though it exceed six per cent, by a few cents, is not usury, so as to defeat the security; but that the excess should be deducted in assessing the sum due. *Bank of St. Albans* v. *Scott*, 1 *Verm.* 426.

SECTION IV.

Of relief in equity.

The general rule is, that after a verdict at law a party comes too late with a bill of discovery. There must be a clear case of accident, surprise or fraud, before equity will interfere. Such now is the established doctrine in England, and has been for a long time in the United States. And the doctrine, as applied to a case of relief from usury, is, that a defendant sued at law on a contract alleged to be usurious, will not be entitled to a bill of discovery if he suffers a verdict and judgment to be taken against him, and especially when he does so without making a defence at law. The reason of the rule is, that the proof of usury is a good defence at law; and when it is in the knowledge of the defendant, no satisfactory reason can be given why the discovery was not sought while the suit was pending.

Whenever a party seeking a discovery had knowledge of the facts during the pendency of the suit at law, equity will not permit him to do so afterwards, to enjoin a judgment. *Brown* v. *Swann*, 10 *Peters*, 497.

An injunction will not be granted against a judgment at law on a charge of *usury*, where a party seeks a discovery of the usury and

a return of the excess beyond the legal interest, for the usury would have been a good defence at law, and no reason was given why the defendant did not seek the discovery while the suit at law, was pending. *Lansing* v. *Eddy*, 1 *J. C. R.* 49. 3 *J. C. R.* 395. *S. C.* 17 *Johns. R.* 436.

Where the plaintiff was sued at law upon notes alleged by him to be usurious, and suffered a verdict and judgment to be taken against him, without making any defence, or applying to chancery for a bill of discovery: *Held*, that he was concluded, and not entitled to relief in this court. *Thompson* v. *Berry*, 3 *J. R. C.* 395. *See also*, 1 *Paige*, 544.

Where a party comes to chancery to avoid a usurious contract, he must consent to pay the sum actually loaned with interest, or the court will not grant him any relief. *Fulton Bank* v. *Beach*, 1 *Paige*, 429.

And where the proofs in a cause are regularly closed, the court will not open them to enable the defendant to re-examine a witness in order to establish the usury, unless he agrees to pay the sum actually due. *Ibid.*

So the court will not allow an answer to be amended for the purpose of setting up the defence of usury, unless the defendant consents to pay the amount actually due. *Idem.*

If the security upon which a suit is instituted is a mortgage or other specialty, the defendant cannot avail himself of a defence of usury under a general answer denying the complainant's right, as claimed by the bill. But the defence of usury must be distinctly set up in the plea or answer of the defendant; and the terms of the usurious contract must be distinctly and correctly set out. The proof must also correspond with the allegation in the plea or answer.

The owner of the premises against which an usurious mortgage is attempted to be enforced, in the court of chancery must himself set up the defence of usury in his answer. He cannot avail himself of a defence set up in the answer of a co-defendant from whom he purchased, who has no interest in or lien upon the mortgaged premises, and who is not a necessary party to the suit. *Vroom* v. *Ditmas*, 4 *Paige*, 526.

Previous to the adoption of the Revised Statutes, the principles upon which a party to a usurious contract could in a court of equity, compel of, and obtain relief against the usurious premium, were perfectly well settled. Neither discovery nor relief could in any case be obtained in the court of chancery without a repayment of the sum ac-

tually lent with lawful interest; because the borrower could not in any case, or under any circumstances, be *equitably* entitled to keep the money which he had actually received from the lender, and for which the lender had received no consideration. He was, therefore, met by that cardinal maxim of a court of equity, "that he who asks for equity must do equity," and could obtain no aid from that jurisdiction in getting rid of, or recovering back the amount which had been improperly exacted from him, until he repaid the amount, which in justice and equity was due from him to the defendant. *Relief*, under such circumstances, when the complainant did not ask for or need a *discovery*, was refused exclusively upon this principle; but where he had no legal evidence of the usury, and the object of his bill was to compel the defendant to disclose or admit the fact, he had an additional difficulty to encounter, to wit: that a court of equity will not compel a defendant to answer upon oath, and thus become a witness for his adversary and against himself, where such answer may subject him to a criminal proceeding, or to a penalty or forfeiture, or to any loss in the nature of a forfeiture. In such a case, therefore, he was bound to waive the forfeiture, and pay the amount actually loaned, not only because it was just and equitable, but in order to guard against the possibility of the defendant's answer being made the means of subjecting him to a forfeiture.

The statute for the prevention of usury, 1 R. L. 64, did not prescribe the terms upon which *relief* should be given, or discovery compelled in a court of equity. Before the revision (of 1830), the law then stood thus: Every usurious contract, and every instrument, of whatever kind or description, taken as the evidence of such contract, were *absolutely void*, and when sued upon such contract, all the borrower had to do, was to prove the usury, and no recovery could be had against him; he defeated the recovery, not only for the usurious excess, but of the sum actually loaned. If he had legal and sufficient evidence of the usury, his defence was perfect at law, and he had no occasion to invoke the aid of a court of equity. If the knowledge of the usury was confined to himself and the lender, then it became necessary for him to go into a court of equity, and by a bill of discovery to call upon the lender to admit or deny the usury. He was then, for the reasons which have already been stated, bound to waive the forfeiture, by paying or offering to pay the sum actually loaned with interest. And in some cases, where the form of the security was such as to enable the lender to collect it either without a suit at law, or in equity, (as a bond and warrant of attorney, or a

mortgage), the borrower, although he had competent evidence of the usury, still, as he had no opportunity, from the form of the proceeding, to avail himself of it at law, was compelled to file his bill and ask *relief* in equity. In such a case, although he sought and required no discovery, a court of equity would not relieve him from the usurious excess, except upon the equitable condition of his repaying the sum actually loaned.

The eighth section of the existing act (1830) contains two distinct and independent provisions—the one prescribing the terms upon which a discovery may be compelled in a court of chancery, in a case of usury; the other relating to the terms or conditions upon which relief may be granted in similar cases.

The first branch of the section provides, whenever any borrower of any money &c. shall file a bill in chancery for the discovery of the money &c. taken or received, it shall not be necessary for him to pay or offer to pay *any interest whatever* on the sum or thing loaned. The question which we have now to determine is, whether he must offer to pay the *principal*. It will be recollected, as the law then stood he was bound to pay, or offer to pay, both principal and interest. This was not required by any express statutory provision, but according to the established principles upon which this branch of its jurisdiction was administered, the court of chancery exacted it as a condition precedent to the compelling of the defendant to answer and make discovery. A bill which did not make such offer was bad upon its face, and might be demurred to. The first observation, then, which occurs is this: That the original power and authority of the court of chancery to impose these, or any other terms as the condition of compelling discovery, were not conferred by any statutory enactments. Such authority belonged to the court by virtue of its general equity jurisdiction. The inquiry then is not what authority does this section confer upon the court of chancery, but to what extent does it circumscribe and limit the jurisdiction which that court confessedly previously possessed, and was in the constant habit of exercising. It is like the passing of a law, inconsistent with some of the provisions of a pre-existing statute. The last act is an implied repeal of the first, so far as these provisions are incompatible with each other, but leaving the original law in full force and effect in all other respects. When the legislature, therefore, with a full knowledge that by the then existing law a borrower could not compel a discovery of the usury without offering to pay *the sum actually lent with interest*, declared that for the future it should not be necessary

for him to offer to pay *any interest whatever*, they altered the law in this respect to the *interest only*, and left it as it stood before in relation to the principal. Nor is this the result merely of a technical rule of construction. It comports, I have no doubt, with the actual intention of the legislature. How natural and easy would it have been for them to have said, it should not be necessary for the borrower in such cases to pay, or offer to pay, *either principal or interest* on the thing loaned, if they had intended to make so important and fundamental a change in this branch of the law.

The second branch of this section declares, that no court of equity shall require or compel the payment or deposit of the principal sum, or any part thereof, as a condtion of granting *relief to the borrower* in any case of a usurious loan; and its construction is by no means free from difficulty.

It has already been remarked, that there was a class of cases in which, from the form of the security, the holder was not obliged to resort either to a court of law or equity to enforce them; such as bonds with warrants of attorney to confess judgments and mortgages. In the first case, the judgment could be entered up without suit, and in the latter, the mortgages could be foreclosed under the statute. In cases where securities of this description were given upon a usurious loan, the borrower, although he could prove the usury without resorting to the oath of the lender, had no opportunity of setting it up, or availing himself of it at law; he was compelled to resort to a court of equity *for relief;* these were the cases for which the legislature probably intended to provide in this clause; and there is no violation of general principles, nor any particular hardship or severity upon the lender, in holding that in such cases, where *relief* only is asked for without discovery from the lender, it shall be granted without requiring the payment of the money loaned. It is but abrogating a particular rule of the court of chancery, for the purpose of giving full effect to, and defeating any evasion of, the law for the prevention of usury. This construction gives effect to the terms used by the legislature, and avoids the serious difficulty and objections which certainly lie in the way of these broad interpretations.

The court of chancery, therefore, can acquire jurisdiction of this case only on the ground of compelling a discovery. *Livingston* v. *Harris*, 11 *Wendell*, 525.

Thus stood the law until the act of 1837.

The statutes as interpreted read: A borrower filing a bill merely

for *discovery* of usury, neednot pay any interest, but must pay the principal. A borrower filing a bill for *relief* where he had no opportunity of defence at law, need not pay principal, but must pay the interest. Under this construction the last clause of the eighth section provided for a different case from the first clause; and although I see, says Murray Hoffman, Ass't Vice Chancellor, no reason whatever in the distinction I have noticed, viz., in requiring payment of interest and not of principal, I think it existed in the statute, and must be regarded. The last clause of the fourth section of the act of 1837, is exactly the same as that of the eighth section, with the addition of the words, *or interest*. As it now stands it is wholly superfluous. The previous clause, especially in conjunction with the fifth section, provides for every case, and thoroughly effectuates the purpose of the act, without this last clause.

What reason is there then for extending the present act beyond that of 1830, as respects judgments hostilely obtained? I find none in the fourth section, because I find it plainly aimed at a point of construction of a former law, and because I see no reason in language or intention to enlarge its operation. Nor does the fifth section of the act extend its bearing. It refers distinctly to those bills which may be filed under the preceding section. It gives the authority to this court to declare the security void, to enjoin a prosecution thereon, and to order them to be surrendered and cancelled. This power resided in the court before. It exercised such power without terms, if the party was driven here. *Moore* v. *M'Kay*, 2 *Molloy*, 137. The section only carries out the principle of the act, in directing a cancelment in all cases without terms. But it is in all cases in which within the act relief is to be given. Again, a strong argument may be built up, that this section does not include a hostile judgment. It re-enumerates bonds, notes, assurances, conveyances, contracts, securities, and evidences of debts *taken or received* in violation of the act, and corresponds with the enumeration in the fifth section of the former act as enumerated. Under the statute of James, it was held, that a judgment was not a contract or assurance, but was *redditum in invitum*. This was applied to a judgment by confession. *Croke Eliz.* 588. *Goldsborough*, 128, 182. 1 *Young's Rep.* 276. In *Grums* v. *Shrieves*, 6 *Monroe's Rep.* 553, it was held, that usury might be averred against all private agreements, bonds, deeds, and writings; even a fine levied upon the usurious contract might be avoided. To the same effect is *Fermer's case*, 3 *Coke*, 80.

Subsequent authorities in England, however, shook the application of this construction to judgments by confession, by permitting a motion to the court of law to vacate the judgment, and let in the defence. The course of these decisions is traced by Chancellor Kent, in *Fanning* v. *Dunham*, 5 J. C. R. 36. He shows a similar practice here, but concludes that the Supreme Court had adopted a different rule, and would not sanction such a motion. There was a subsequent case in 1823 (1 *Cowen*, 36) in which, however, the court granted it. I do not find any later decisions, but in *Livingston* v. *Harris*, 11 *Wendell*, 525, the Chief Justice speaks as if in such a case the party was compelled to resort to a court of equity. But whatever may be the rule in a court of law, the distinction between a judgment by bond and warrant of attorney and one had upon a trial is marked. The former constitutes part of the contract, or security, is given at the time, and is the "deceitful engine" for effecting the usury. The other is no part of the contract; must be rendered after defence, or after the full opportunity for defence. It may be urged it is a security or evidence of debt. In a broad sense, a judgment is such; but the phrase of the section requires that it *has been taken or received*, in violation of the act. This implies a transfer and acceptance, and it confirms the views I have taken, that the statute comprehends every thing which by a union of the wills of both parties is had or required, and comprises nothing more. A hostile judgment is not obtained by mutual consent.

The third section of the act may be resorted to. It corresponds exactly with the sixth section of the Revised Statutes, except that the defendant may be compelled to answer on oath, whether the bill is for discovery or relief. In the former it was limited to a bill of discovery, the forfeiture being only the interest. But the section cannot enlarge the jurisdiction of the court. On the contrary, it is restricted to cases in which, by the fair construction of the whole act, bills may be filed.

What then is the doctrine of the court? In general, that which applies to every other case of its interference with a judgment. There must have been fraud or accident, or improper conduct of the opposite party—that the applicant was ignorant of the defence at the time, or that it could not have been secured at the trial. *Foster* v. *Wood*, 6 *John. C. R.* 90. In cases directly in point, *that is, on bill filed by defendant in a judgment at law to obtain relief in equity from such judgment*, they either show the entire rejection of the suit in this court, or its admission only on the ground of paying the amount

legally due. And when the bill is entertained, even upon this condition, there must be some strong extraneous equity to induce the court to relieve upon it. 5 *Paige*, 250. 7 *Paige*, 161. 3 *Harris & Johnson*, 568. *From Topping* v. *Van Pelt*, *Hoffman's R.* 525.

Vice Chancellor Whittlesey says, (in *Post* v. *Boardman*, 1 *Clark*, 334,) if the complainants have been negligent in not calling upon the plaintiff at law, in the trial at law, when his testimony would have proved his defence at law, I shall not aid them in avoiding the consequences of that negligence by sustaining this bill, (*which was to be relieved from the operation of the judgment*,) even though they were surprised by the declining of Silas Boardman to testify. But if the plaintiff at law could not have proved the usurious transaction, if called upon, the surprise induced by the position in which Silas Boardman placed himself, would justify resort to this court. The defect in the bill is, that it does not allege that John Boardman, if called upon to testify under the act of 1837, could not prove the defence; in other words, the bill renders no sufficient excuse for not taking advantage of the means which the act of 1837 put in the power of the complainant to have the whole question fully tried at law. If it could have been fully tried there, it cannot be heard here. The facts of the case may however authorize the complainants to add such an allegation to their bill.

It seems the word "borrower" in the statute is to be strictly construed.

A purchaser of premises incumbered by a usurious mortgage, cannot file a bill in equity, either for discovery or relief to set aside the mortgage as usurious, without offering to pay the amount actually loaned and secured by the mortgage with interest.

The fourth section of the act of 1837 is almost word for word like the eighth section of the statute of 1830. The fourth section of the latter, like the eighth section of the former, only mentions the "borrower," and there is really only this difference so far as this question is concerned, that under the latter act the "borrower" can file a bill for a discovery of usury, without paying either principal or interest; and under the former act he could not, by judicial construction, file such a bill for *discovery*, without paying the principal. In this feature, the law of 1837 has legislated away the authority of the case of *Livingston* v. *Harris*, as to that particular point. The complainant can derive no more aid from the third section of the act of 1837, than he could from the sixth section of the Revised Statutes before referred to. Under both, and indeed all our usury laws, the usurious offender is

bound to answer on oath a bill in chancery; but under neither, more than under our former laws, are the terms upon which he shall be compelled to answer, or relief granted, prescribed:—

The fourth section of the act of 1837 is substantially the same as the sixth section of the Revised Statutes, and both have substantially the provisions of our law, under which the court of chancery have adopted their rule. Neither will the fifth section of the act of 1837 give any more aid to the complainant. That section only prescribes the duties of the court of chancery after the usury is proved or admitted. It directs what the final decree shall be, but not the terms which may be prescribed, to enable the complainant to institute his proceedings.

The act, therefore, if applicable to this case, will not aid the complainant in this aspect of the case, and so far as the question of usury is concerned, it must be held that the bill cannot be maintained, unless the complainant brings into court, or pays, or offers to pay, the amount actually loaned. The complainant is no more a borrower under the law of 1837, than under the Revised Statutes, and that law no more aids him than would the Revised Statutes. *Cole v. Savage et al, Clark's Rep.* 490–1.

A court of equity is bound by the statute of usury, and although upon the bill of the borrower, aid will be extended upon the terms of his paying the sum lent, with lawful interest, yet the lender can have no relief whatever, and his bill to foreclose a usurious mortgage will be dismissed. 2 *Dev. Eq.* 75.

A court of equity never assists a creditor who has been guilty of usury, and where, according to the bill, usurious interest was incorporated in a note by the fraudulent contrivance of the debtor, for the purpose of taking advantage of it, relief was refused. 1 *Dev. & Bat. Eq.* 50.

A contract tainted with usury is denounced by the law of the land as corrupt and utterly void, and every court must treat it as holding the character which the legislature has stamped upon it. It is regarded as an oppression practised upon the borrower. A court of equity, therefore, cannot be invoked to aid such a contract in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression cannot demand help, even against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honour and morality. *Per Gaston, Chancellor.*

CHAPTER V.

OF THE PUNISHMENT OF USURY.

WHETHER or no an indictment lies at common law for the offence of usury, is a question upon which the English books do not rightly agree. No indictment, as far as appears from the reports, has been prosecuted since the seventh year of the reign of Queen Anne. *The Queen* v. *Dg.* 11 *Mod.* 174. And as that occurred five years before the passage of the statute now in force, and was then quashed as bad, it is hardly to be expected that the courts will ever again be called upon to speak as to the validity of an indictment for usury. *Comyn.*

It will be seen that the statutes of several of the United States contain a provision for punishing the usurer by indictment, but such provisions remain for the most part a mere dead letter, no action being taken upon them.

OF AN ACTION QUI TAM FOR USURY UNDER THE STATUTE OF ANNE.

[From Comyn's Work on Usury.]

SECTION I.

Of the accruing of the action.

By the statute of Anne, the lender, in case he takes more than £5 *per cent.*, forfeits the treble value of the monies, wares, merchandizes, and other things, lent, bargained, exchanged, or shifted, half to the king, and half to the prosecutor, which penalty is to be sued for in the county where the offence is committed, *and not elsewhere*, by action of debt, bill, plaint, or information, in which no essoign, wager of law, or protection, shall be allowed.

This action, like other penal actions, must be brought within a

year after the offence is consummated;[1] and therefore it is always material to consider when the consummation of the offence takes place, so as to charge the usurer in proper time.[2]

According to the earlier cases, the very making of the usurious contract, subjected the lender to the penalties of the statutes, although he never received one farthing;[3] and in *Hedgeborrow* v. *Rosenden*,[4] (which was a case on a gaming security,) it was said, that if one contracts for more interest than the statute allows, *if the creditor request it*, though he never does request it, yet it is within the statute of usury.

But the rule laid down by these cases is unsupported by other decisions; and though it is said in *Mallory* v. *Bird*,[5] that if one contracted to have £20 upon the loan of £100, if he took nothing of the £20, he should not be punishable by the statute; but if he took any thing, if but one shilling, this was an affirmance of the contract, and made him liable for the whole. The rigour of this doctrine is considerably softened by an interpretation of Mr. Justice Aston, that by one shilling is meant one shilling beyond the legal interest.[6] And the learned judge's interpretation is strongly confirmed by an early case, in which it is said, that if A borrow of B £80, and be bound in an obligation to pay him £90 at the end of the year; yet, if he take but £80, although the obligation be void, this would not be usury to make a treble forfeiture.[7]

But where a premium is paid for the loan, which coupled with the interest, exceeds the legal rate, the action does not accrue till the interest is received.

As, where a sum of money was lent upon an agreement to pay legal interest and a premium over and above was paid at the time of the money's being advanced, *such premium in itself not exceeding the legal interest*, the question was, whether the penalty was incurred at the time of the receipt of the premium, or whether it did not accrue

[1] By the Stat. 31 Eliz. c. 5, s. 5, the common informer is limited to a year after the offence is committed; and if no suit is so brought, then the king may sue any time within two years after the end of the first year. And after the first year, when the suit is lapsed to the crown, the Court of King's Bench will not grant a *qui tam* information. Rex *v.* Hendricks, Str. Rep. 1234.

[2] Lloyd, *qui tam v.* Williams, Bl. Rep. 793. Same case, 3 Wils. 250.

[3] Whinton, *qui tam v.* Marine, Dyer, 95, 6.

[4] 1 Ventr. 254. [5] Cited Cro. Eliz. 20.

[6] Stated by Mr. Justice Buller, in Fisher *v.* Beasley, Dougl. 362.

[7] Brown *v.* Fulsbye, 4 Leon. 43. And see Martin Van Henbeck's case, 2 Leon. 38.

until the interest was paid. The sum lent was £100; the premium £2 2*s.*; and at the end of six months, when the principal was repaid, £2 10s. was also paid for interest; the action not having been commenced till above a year after the payment of the premium, but within a year from the payment of the interest. Lord Mansfield, at the trial, nonsuited the plaintiff, upon the ground that the penalty was incurred upon the payment of the premium; and that the action, not having been commenced within a year from that time, was now barred. But afterwards, upon a motion for setting aside the nonsuit, the whole court were of opinion that the penalty did not accrue *till the receipt of the interest*, and consequently that the plaintiff was in time with his action.[1]

So where A had borrowed £600 of B, paying him ten guineas premium; and at the end of the half year, A paid £15 for interest; it was urged, that till the whole year was expired there was a *locus pœnitentiæ*, and that the premium being entire, and received for a year, it could not be apportioned and tacked to the half year's interest. But the court overruled the objection, and *held* that the usury was complete at the payment of the half year's interest.[2]

But where A lent B £500, paying immediately a premium of £50, and paying interest *on the* £500 at the rate of £5 *per cent.* for five years, at the end of which time a *qui tam* action was brought, the Court of Common Pleas held that the loan could only be taken as a loan of £450, because £50 had been returned at the time of the loan; and that, as the interest received at that rate, as on £500 for the last year, was usurious, the action was not barred by lapse of time.[3]

Though the usury is complete as soon as the lender has received the interest in money or money's worth, yet the mere taking of a promissory note for payment of the sum lent, with usurious interest, does not complete the usury, unless the bill be paid; for, until it be paid, the lender has received nothing.[4]

So where money is lent by a check, it is not a loan within the statute till the check is cashed.[5]

And although it be not *punishable* to make an usurious contract, if such usurious contract be not carried into effect, yet it is said by Baron

[1] Fisher, *qui tam v.* Beasley, Doug. 235.
[2] Wade *qui tam v.* Wilson, 1 East's Rep. 195.
[3] Scurry *qui tam v.* Freeman, 2 Bos. and Pul. 381.
[4] Maddock *qui tam v.* Hammett, 7 Term Rep. 184.
[5] Brooke *qui tam v.* Middleton, 1 Camp. 445. And see Borrodaile *qui tam v.* Middleton, 2 Camp. 53.

Gent, in Sir Wollaston Dixie's case, that if A lend B £100 without any contract for interest, and afterwards, at the end of the year, B gives him £20 for the loan thereof, the same is within the statute; for his acceptance makes the offence without any bargain or contract.[1] For the statute refers as well to past as to future forbearance.[2]

The difference of the effect of the statute in the avoiding of the contract, and the accruing of the penalty, is therefore manifest. As soon as an usurious contract is made, it is *ipso facto ab initio* void. But the penalty does not arise upon the making of the contract. That is only incurred by the execution of the contract; or by the receipt of excessive interest without any previous usurious agreement.[3]

The time for bringing the action being settled, the next question is, as to the proceedings in the action. These I shall consider in their proper course.

SECTION II.

Of the process and pleadings in a penal action for usury.

A *qui tam* action on the statute of usury, to receive treble the value of the sum forborne, can only be brought in the Superior Courts at Westminster.

Therefore, where such an action was prosecuted in the Court of Ely, a writ of error was brought.[4]

[1] 1 Leon. 96. And see Anon. 1 Ventr. 38; and Rex *v.* Walter, 1 Sid. 421.

[2] Rex *v.* Rant, Trin. 16 Car. B. R. cited Vin. Abr. Us. (1.)

[3] Mr. Sergeant Hawkins, referring to some of the cases, concludes, that if there be no contract, and the interest is only paid beforehand for *convenience'* sake, without any corrupt intention, it will not incur the penalty. Hawk. P. C. c. 82, s. 14. But *quere*, whether this is not carrying the notion of a want of a corrupt intention to too great a length? The parties who enter into a contract not usurious in its terms, will not, as we have before seen, be prejudiced by a mere mistake in expressing the contract. Yet if they agree to do a thing which they believe to be legal, but which turns out to be usurious, this cannot be called a mistake, but is an ignorance of law, which affords them no excuse. The question must always be, Has the lender taken more than five *per cent.*? If he has, it will be an unavailing apology to say, that he did it for *convenience'* sake. All usury is committed for convenience' sake.

[4] Gardner *v.* Morefield, 1 Keb. 554, pl. 67; which cites Gregory's case and Barrington *v.* Kine, 1 Cro. This last reference is incorrect, as no such case is to be found in Croke. And see Anon. Hardr. 420.

The borrower of the money is as capable of suing for the penalties as a stranger;—but, it seems, that previously to the commencement of the suit, he must repay, or at least tender, all the money borrowed.[1]

And in commencing the action, it is no variance or irregularity if the plaintiff sues out the writ in his own name, and afterwards declares *qui tam;* for by this his demand is rather narrowed than enlarged.[2]

The action is local by the express words of the statute of Anne, and must be brought in the county where the offence was committed.[3]

And in Sir Wollaston Dixie's case,[4] it was said that the information[5] need not show the place where the contract was made, but that it should show where the taking was; for the receipt is what is punishable by the statute, and not the contract: and it shall be tried where the taking was.

And in debt on bond made at S, the defendant pleaded a corrupt contract made at B; and on issue joined, and the *venue* awarded from B, it was moved that it should be by a jury from both places; but, by the court, the *venue* is well awarded.[6]

So where a draft was given with usurious interest, and a receipt taken for it in the county of A, and the draft was afterwards exchanged for money in the county of B; the usury being committed in B, it was holden that the *venue* must be laid there.[7]

An information upon the statute of usury, for an usurious mortgage, charged the defendant, that he had taken more than lawful interest for the forbearance of one year; and that this taking was out of the issues, rents, and profits, which he received in Middlesex, of lands in Glamorganshire, that had been mortgaged to him. Manwood said, the taking of the issues ought to have been laid where the land was.[8]

But in a case of much later date, where an usurious contract was entered into by deed executed in London, appointing A, the lender, to be the receiver of B the borrower's rents in Middlesex, with a pretended salary; and A accordingly received the rents in Middlesex, but settled the balance with B in London; the Court held that the *venue*

[1] Fitzroy *v.* Gwillim, 1 Term Rep. 153.

[2] Lloyd *qui tam v.* Williams, 2 Bl. Rep. 722. Same case, 3 Wils. 141.

[3] And see Stat. 21 Jac. 1, c. 4.

[4] 1 Leon. 97, pl. 125. Toptcliff *qui tam v.* Waller, Dyer, 346, b. pl. 9. Same case, 1 And. 48, pl. 122.

[5] The statute by "*information*" means an information *qui tam.* 1 Barnard, 209.

[6] Stanton *v.* Barton, 2 Bulstr. 34.

[7] Scurry *qui tam* v. Freeman, 2 Bos. and Pul. 381.

[8] Owen Morgan's case, 3 Leon. 238, pl. 327.

was well laid in London, for the offence did not appear to be complete till the account was settled.[1]

And if the foundation of the action arises in two counties, the *venue* may be laid in either.[2]

In framing the declaration in an action on the statute of usury, several things are to be considered, which are material to the validity of the pleadings; and any misstatement of which will prevent the plaintiff's recovering.

These are,

1. The *time* of the contract or loan.
2. The *animus quo* of the person forbearing.
3. The person to whom the debt was forborne.
4. The substance of the contract and forbearing.
5. The taking of the excess of interest.
6. The formal conclusion.

1. *The time of the contract or loan.*

The time of the contract or lending must be stated to be subsequent to the passing of the statute; viz., after the 29th day of September, 1714; but if this appear by the terms of the contract or instrument itself, it is sufficient without a formal allegation.[3]

The day of the loan must be exactly stated, and a nonsuit will be the consequence of a variance in this respect.

Thus where the plaintiff declared, that upon a corrupt contract *made on the* 21*st day of December*, 1774, the defendant received £6 8s. upon the loan of £——, for giving day of payment to the 23d of *December*, 1776; and it was proved that the corrupt contract was *made on the* 23*d of December*, 1774, for two years; the variance was held to be fatal.[4]

So where the corrupt agreement was stated to have been on the 26th of *March*, 1801, and it appeared that the money was not advanced till the 27th, the plaintiff was nonsuited on this variance.[5]

[1] Scott *qui tam v.* Brest, 2 Term Rep. 238.

[2] Ibid., and Bulwer's case, 7 Co. Rep. 57. And see, upon this point, Jennings *v.* Hunkin, 2 Lev. 122; and Adderly *v.* Wise, 2 Lev. 164: together with the cases cited there.

[3] Baynham *v.* Matthews, Fitzgib. 130.

[4] Carlisle *qui tam v.* Trears, Cowp. 671.

[5] Harris *qui tam v.* Hudson, 4 Esp. N. P. C. 152.

And where the loan was stated to have been on the 20th of April, and it was proved that the money was lent by check sent by letter on the 20th, *but not received till the 21st.* Lord Ellenborough, Chief Justice, held this a fatal variance.[1]

So where the loan was stated to be *on the 21st of April*, and in proof it appeared, that on that day the borrower received from the defendant, as part of the sum lent, a check which was void for want of a stamp; and that the *same day* he paid this into the banker's, who immediately gave him credit for the amount, but that his banker did not receive payment of it till the 22nd. Lord Ellenborough, Chief Justice, considering the check as a nullity, thought that there was no lending till the 22nd, when the money was absolutely received, and therefore his lordship nonsuited the plaintiff.[2]

Goulton owed Flintoft £600 on bond, and Flintoft was indebted to the defendant (Wilson) in £1,200, on a promissory note. Flintoft, being unable to pay the defendant more than half of his debt, on account of the default of Goulton, it was agreed between the respective parties on the 4th of April, 1798, that the defendant should accept Goulton and one Yates, by way of surety for him, as defendant's debtors, for the remaining £600, instead of Flintoft; the defendant saying, however, that he would only lend Goulton the money for one year, which was agreed to. Accordingly, Goulton and Yates gave their promissory note of that date, by which they jointly and severally promised to pay to the defendant, or order, £600, on demand for value received, with interest after the rate of £5 per cent. per annum, and the defendant at the same time received from Goulton a premium of ten guineas. Flintoft, however, having omitted to bring Goulton's bond with him, it was agreed that the old securities should be the next day delivered and cancelled, which was accordingly done. The declaration laid it as a loan of money from the defendant to Goulton *on the 4th of April*, 1798. It was objected that there was no loan of money, none having been received by Goulton; and that the making himself the debtor, instead of Flintoft, and giving his own note for the money, did not constitute a loan, though it might have been laid as a corrupt contract; or if it did constitute a loan, it was not such to Goulton alone, but to him and Yates jointly. It was also objected, that the loan was improperly stated to be on the *4th of April*, for that the agreement did not take effect till the bond given by Goulton

[1] Brooks *qui tam v.* Middleton, 1 Camp. 445.
[2] Borrodaile *qui tam v.* Middleton, 2 Camp. 53.

to Flintoft was cancelled. The Court overruled all the objections, and held the transaction to be rightly described.[1]

2. *The animus quo.*

It has already been said, that a mere mistake will not make the lender liable as for usury; and, therefore, in order to charge him, it must be expressly stated, that the taking of excessive interest was "*per corruptam accommodationem,*"[2] or "*quod corrupte agreatum fuit.*"[3]

But where the declaration stated that the defendant, *corruptivè*, lent £40, &c., and also, that he lent £20, without saying *corruptivè*, it was, nevertheless, held, that the judgment should be given for that part which was good.[4]

So where the defendant was indicted for usury, without saying *quod corruptè agreatum fuit*, the indictment was quashed.[5]

But it is otherwise in a *verdict*, which is the finding of lay gents.[6]

3. *The person to whom the debt was forborne.*

It is also necessary to state with precision the person to whom the forbearance was given. For in an information for usury, where the contract was laid to be with *persons unknown*, it was holden ill.[7]

Yet it seems, that though it be not specially averred that the forbearance was to A, if it appear to have been so with certainty, it will be sufficient.[8]

If more than legal interest be taken by the defendant, on a note given to A by B, as a collateral security for money lent to C, and endorsed by A to the defendant, such usury is well described to be for the forbearance of money lent by the defendant to B.[9]

[1] Wade *qui tam v.* Wilson, 1 East Rep. 195.

[2] Doctor Foster's case, 11 Co. Rep. 58. Doctr. Plac. 332. Emmet *v.* Fulwood, 1 Anders. 49, pl. 123.

[3] Per Croke J. in Roberts *v.* Tremoile, 2 Rol. Rep. 48. And see Higgins *v.* Mervin, cited Cro. Jac. 508.

[4] Woody's case, Cro. Jac. 104.

[5] Rex *v.* Gart, or Garth, 1 Keb. 629. Vide Farrell *v.* Shaw, 2 Keb. 525, and Symonds *v.* Cockerill, Noy, 151.

[6] Per Croke J. in Roberts *v.* Tremoile, 2 Rol. Rep. 48.

[7] Nasie's case, Noy's Rep. 143.

[8] Marshall *v.* Buckenshaw, 1 New. Rep. 172.

[9] Manners *qui tam v.* Portan, 3 Bos. and Pul. 343, and Wade *qui tam v.* Wilson.

So, if a person discounts a bill of exchange, and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest, under pretence of guaranteeing the acceptor, the sum first paid may be laid as forborne to the person who first received the money on endorsing it to the discounter; even supposing that that person, if sued on the bill, might recover over against the discounter as guarantee.[1]

4. *The substance of the contract of forbearing.*

It is sufficient, in setting out the contract, to describe the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and the action or information may be brought by a stranger, who cannot have the same means of knowledge as the parties themselves.[2] There are, however, three points upon which the greatest accuracy is requisite, because the judgment depends upon them.[3] These are the sum forborne, the *time* for which it is forborne, and the excess of interest taken.

In the case of Lee *v.* Cass, just cited, the Court held that the sum first paid might be stated as the sum forborne; and Sir James Mansfield, Chief Justice, added, that in such case it was usual to declare upon the *transaction* in both ways, as well on the sum contained in the bill, as on the same sum diminished by the discount; but that either way would suffice.[4]

And it has been said, that it must be shown who forbore the money,[5] as well as whose money it was that was forborne.[6]

In one case where there was a contract for a *loan of money*, a *specific sum* was stated to have been lent; but it appeared in evidence that the loan had not all been in money, but that to make up part of the sum, gold of a known value had been taken as cash. Upon its being objected that this was a variance, the Court held that the contract was proved as laid, because it was not originally a contract for the delivery of goods, but for a loan of money. The contract was for the loan of money, and it was only in the execution of the contract,

[1] Lee *qui tam v.* Cass, 1 Taunt. 511.
[2] Bedo *v.* Sanderson, Cro. Jac. 440, and 1 Hawk. Pl. Cor. c. 82, s. 24.
[3] Rex *v.* Gilham, 6 Term Rep. 265.
[4] 1 Taunt. 516. [5] Kenn's case, Dyer, 367, b.
[6] Per Manwood, Ch. B. in Sir Wollaston Dixie's case, 1 Leon. 97.

that a particular commodity was made to stand in the place of the thing which constituted the value.[1]

The *time of forbearance*[2] must be stated with accuracy, as well as the time of the loan.

The defendants, on the 30th of April, 1810, discounted for B a post-dated bill, bearing date the 16th of May, 1810, and gave in lieu thereof, a bill which had then seven days to run, and which consequently would become due on the 7th of May; for this the defendant made no rebate; this was laid in the declaration to be a loan of the amount of the first bill, from the 7th of May till the 16th, and the Court thought it rightly laid.[3]

The *excess* of interest must also be correctly set out; for to show that more than legal interest was taken will not suffice, unless the exact amount be stated.[4]

5. *The taking of the excess of interest.*

The declaration must state that the corrupt agreement was followed up by a loan, and the actual receipt of excessive interest.[5]

6. *The conclusion.*

The declaration must end with the formal averment, *contra formam statuti.* It is, however, unnecessary to aver the particular statute.[6] And no damage must be stated; because, until the informer's commencing the action, no interest attaches to him, and the debt only arises upon the judgment.[7]

[1] Barbe *qui tam v.* Parker, 1 Hen. Bl. 283.

[2] It is said in Sir Wollaston Dixie's case, that where there is a loan for twelve months, this shall be intended of calendar, and not lunar months. 1 Leon. 96. See also Catesby *v.* Bishop, of Peterborough, Cro. Jac. 141, same case. Yelv. 100. But see Tullet *v.* Linfield, Burr. 1455.

[3] Hutchinson *qui tam v.* Piper, 4 Taunt. 810.

[4] Martin Van Henbeck's case, 2 Leon. 39, pl. 52.

[5] Rex *v.* Upton, Str. 816.

[6] Toptcliff *qui tam v.* Waller, Dyer, 346, b. Same case, 1 And. 48, pl. 122.

[7] Frederick *v.* Lookup *qui tam* in error, Burr. 2018. Cuming *v.* Sibly, Burr. 2489. As to pleading to an information, see Paramore *v.* Robinson, cited Cro. Jac. 544.

SECTION III.

Of amendment in a penal action for usury.

While all is in paper, an amendment may be made at common law, as well in *penal* as in civil actions; but the permission to amend is entirely in the discretion of the court.

In a declaration in a *qui tam* action for usury, the court granted leave to amend by altering the date of the note, all being in paper.[1]

So the Court of King's Bench amended a misnomer of the defendant's christian name in a penal action.[2]

So after the record had been made up, and carried down to trial, and withdrawn by the plaintiff, the court granted leave to amend as to the sum lent.[3]

And in another case, after the record was withdrawn, the defendant had leave to amend by altering the venue.[4]

And the court will grant leave to amend, even after the time limited for bringing a new action has expired, provided the plaintiff has not been guilty of any unnecessary delay in prosecuting his suit, and the amendment does not introduce any new substantive cause of action.[5]

But the amendment in the declaration will not be permitted where there has been any delay on the part of the plaintiff, even though the pleadings are still in paper.[6]

As where the action has been depending four years.[7]

Neither will the court, in a penal action, alter the term of which the declaration is entitled to a previous term, in order to bring it within the time limited for the action.[8]

Nor is there any instance in which the court has given leave to amend, *as to the parties to the suit*, in a penal action, *after demurrer*.[9]

[1] Bonfield *qui tam v.* Milner, Burr. 1098.

[2] Mertaer *v.* Hurst, B. R. Hill, 1815, cited 1 Marsh. Rep. 420.

[3] Mace *qui tam v.* Lovett, Burr. 2833.

[4] Tailleur *qui tam v.* Cocks, B. R. Tr. 1782, cited 6 Term Rep. 173.

[5] Cross *v.* Kaye, 6 Term Rep. 543. Maddock *qui tam v.* Hammett, 7 Term Rep. 55.

[6] Ranking *qui tam v.* Marsh, 8 Term Rep. 30. Steel *qui tam v.* Sowerby, 6 Term Rep. 171.

[7] Goff *qui tam v.* Popplewell, 2 Term Rep. 707.

[8] Woodruff *v.* Williams, 1 Marsh. Rep. 419.

[9] Per Buller, J. in Evans *v.* Stevens, 4 Term Rep. 228.

But the court will amend the verdict by the judges' notes, if the jury, by mistaking the date of the instrument, create a variance for which the evidence affords no foundation;[1] but not if any evidence has been given, by which it was competent for the jury to find as they may have done.[2]

SECTION IV.

Of compounding and settling a penal action for usury.

The prosecutor may, if the defendant consent, compound the action on the statute 18 Eliz. c. 5; but such composition must be with the leave of the court, otherwise it is penal.[3] But the court will in general grant this leave, even after verdict.[4]

And where a rule has been obtained by the defendant for staying the proceedings on payment of part of the penalties, the court will grant an attachment against him for non-payment.[5]

The attorney general may enter a *nolle prosequi* on behalf of the crown; but he cannot enter it, except for the king's part of the penalty.[6]

SECTION V.

Of the evidence in a qui tam action.

Supposing the action be not compounded, but regularly proceeded in, the next question will be, as to the evidence: Who will be a competent witness; and what will be sufficient proof to charge the defendant?

Where an action *qui tam* is brought by a stranger, the borrower will be a competent witness to prove the usury, *after the repayment of the money.*[7] And therefore to let in the borrower's evidence, it will be necessary to show that the money has been repaid.

In one case,[8] Chief Justice Lee refused to let the borrower him-

[1] Manners *qui tam v.* Postan, 3 Bos. & Pul. 343.
[2] Ibid. 345.
[3] Bland *v.* Featherstone, Barnes, 118, 3d edit.
[4] Maugham *qui tam v.* Walker, 5 Term Rep. 98.
[5] Hart *qui tam v.* Draper, 2 Marsh. 358; and King *v.* Clifton, 5 Term Rep. 257.
[6] Streton *v.* Taylor, Cro. Eliz. 138.
[7] Long's case, 1 Ventr. 191.
[8] Shank *qui tam v.* Payne, Str. 633.

self prove the repayment; conceiving that, until the money was shown to have been repaid, he could be no witness at all. But since that case, the Court of King's Bench have held that the borrower is a competent witness to prove both the usurious contract and the repayment of the money, because they considered that the repayment itself established his competency and credit.[1] And this decision has since been revised and confirmed in a case where an action had been brought to recover the penalties of the statute upon a loan and forbearance to one Bromer, who was called as a witness to prove the transaction. In addition to his being the borrower, it appeared that he was an uncertificated bankrupt; and although the sums laid in the declaration had been paid with the lawful interest, still he was largely indebted to the defendants on a running account for different loans, in which the sums declared on were included. Lord Kenyon suffered him to be a witness, thinking that the objection went to his credit, and not to his competency.[2] And this opinion he afterwards confirmed on a motion for a new trial, the rest of the court concurring.[3]

So that, in addition to its being established that the borrower may prove the whole case, it seems that not even his being indebted to the defendants on *a general* balance will affect his competency, provided the particular sums in question have been paid.

But in an action on the statute against the assignee of a bankrupt, for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is willing to give a release to his assignees of the benefit which may arise from the discharge of this debt in particular, and all claim to allowance or surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission.[4]

As to what will be evidence *against* the defendant;—in an action for usury, in discounting a bill, where it was proved that one Brown demanded payment of the acceptor, and commenced an action against him in order to compel payment; in consequence of which a person on behalf of the acceptor, paid to Brown the amount of the bill, and the costs of the suit, on producing the bill, for which Brown gave a

[1] Abraham *qui tam v.* Bunn; Burr. 2251; and see Parris's case, 1 Vent 49.

[2] Smith *qui tam v.* Prager, 2 Esp. N. P. C. 486.

[3] 7 Term Rep. 60; and see Bent *v.* Baker, 3 Term Rep. 27.

[4] Masters *qui tam v.* Drayton, 2 Term Rep. 496.

receipt as the attorney for the defendant; and no account was given how Brown came by the bill: it was holden that there was sufficient evidence to be left to a jury, that Brown acted as the defendant's agent, and consequently that the defendant had received usurious interest.[1]

As to the evidence *for* the defendant, it has been held, that where it had been proved that the defendant had taken from one Ubank £50, for the loan of £1000 for six months, it was not competent for the defendant to give in evidence an account in the handwriting of Ubank, wherein he admitted part of this £50 to have been paid on the balance of an old account.[2]

SECTION VI.

Of the consequences of the trial of a penal action for usury.

If an information be brought against *two*, and only one be found guilty, there can be no judgment in this case.[3]

And usury shall not be intended, unless the jury find it expressly.[4]

But if, upon *nil debet* pleaded, the jury find an usurious receipt, and do not find any loan, a new *venire* shall be awarded, and not a new *nisi prius*.[5]

If the prosecutor be nonsuited, this shall not prejudice the crown.[6]

And it is said, in Salked, that one *in execution* for usury cannot be bailed, though there be an error on the record, and though it was formerly the custom to bail in such a case; but that it is otherwise on an *audita querela*.[7]

In an action *qui tam* for taking excessive usury, the declaration stated the taking to have been in pursuance of a loan of $200, by means of a promissory note, and the evidence was of a loan of $200, *and the interest thereon for more than six months. Held*, that this was a material variance. An amendment will not be allowed in an action *qui tam* to recover the penalty for an offence which at the

[1] Owen *qui tam v.* Barrow, 1 New. Rep. 101.
[2] Maugham *qui tam v.* Walker. Peake, N. P. C. 163.
[3] Page's case, Lane, 19. Vaux *v.* Austin, Lane, 59.
[4] Webb *v.* Worfield, Bridg. 112.
[5] Loveday's case, 8 Co. Rep. 130.
[6] Stretton *v.* Taylor, Cro. Eliz. 138.
[7] 3 Salk. 58, pl. 18.

time of making the motion is barred by the statute of limitations. *Drake* v. *Watson*, 4 *Day*, 37.

In an action *qui tam* for usury, the plaintiff alleged a loan by the defendant to A for sixty-three days, and produced in evidence a note executed by A and B jointly and severally, payable to the defendant in *sixty* days: held to be a fatal variance. *Wilmot* v. *Munner*, 4 *Day*, 114.

A conveyed to B land of the value of $1600, for the consideration of $300; B at the time agreeing to reconvey it upon payment of $522 97 at two instalments, the last within three years from the date of the contract; no part of the $522 97 were paid. It was held that B was not liable to a *qui tam* action for taking usurious interest. *Thompson* v. *Moses*, 7 *Mass.* 361.

A receives B's note, payable at a day certain, and delivers him the amount secured by the note, deducting interest for the time the note had to run, at the rate of *two per cent. per month* on the $400. In an action by A on the note, the defendant had judgment on the ground that the contract sued was usurious. In an action for the penalty by the statute, it was holden that A was not liable. *Simpson qui tam* v. *Warren*, 15 *Mass.* 460.

The act against usury, after fixing a penalty of three times the usurious loan, to be recovered by action of debt, limits the commencement of the action to six months after the offence committed. Defendant lent $100 on usurious interest, and received various sums on account of the loan, more than six months before action brought, and the balance of principal and usurious interest within six months. *Held*, that the plaintiff was entitled to recover three times the amount of the sum originally loaned. *Stewart* v. *Fowler*, *Harper's R.* 403.

A, being in want of money, applied to B, and it was agreed between them, that A should receive from B the note of one L, which he held, and give therefor to B a bond payable to S for the sum due on L's note, with fifteen per cent. A gave his bond accordingly to S, by whom it was endorsed to the brother of B, in whose name a suit was brought and judgment recovered, and the money was collected by an execution against A. *Held*, that A was guilty of usury, and that it was no defence for a lender of money on usury in an action *qui tam*, to say that he acted as another's agent, unless he disclose the agency at the time of contracting. Whether being *particeps criminis*, such disclosure at the time would avail him. *Wilkes* v. *Coffie*, 3 *Hawks*, 28.

A sheriff who had collected money upon an execution, and had

neglected to pay it to the plaintiff, and was thereby subject to damages at the rate of twelve per cent. per annum, having lent the money thus collected to a third person at the same rate of interest, was held guilty of usury, and liable to the penalty by the act of 1741. *Dowell* v. *Vannoy*, 3 *Dev.* 43.

It seems that an agent who lends money at an usurious rate of interest is liable to the penalty, notwithstanding he discloses his character. *Ibid.*

In an action to recover the penalty given by the statute against usury, it is not necessary to show that the principal money had been paid. The offence is complete when any thing is secured for the forbearance over and above the rate of six per cent. per year. *Seawell* v. *Schomburger*, 2 *Murphy*, 200.

Where an usurious agreement is made in this state, but the illegal interest is secured in South Carolina, an action will not lie for the penalty. *Graham* v. *Lewin*, *N. C. Term Rep.* 189.

Action of debt on the statute of usury: Pleas general issue and statute of limitations: Motion by plaintiff to amend the pleadings by replying to the statute of limitations, "a former suit between the same parties, and a new suit therein, and that this action was brought within a year and a day thereafter," Motion disallowed; for, 1st The amendment, if allowed, would be unavailing. The statute limiting penal actions contains no such saving as the plaintiff wishes to reply, nor a saving of any description. 2d. The nature of this action forbids the amendment. This was no man's particular cause of action until brought. It became his by the suit, and he lost it by the dismission. It then became common, and liable to be brought by any person. If brought by a stranger, it was a new suit; so if brought by the same person. It was not a continuance of his old suit, for it was his no longer than it depended. *Clark* v. *Rutherford*, 3 *Murphy*, 237.

In debt *qui tam*, under the statute of usury, the plaintiff may recover less than he declares for, and the verdict shall be good. *Dozier* v. *Bray*, 2 *Hawks*, 57.

The payment of the usurious interest to the sheriff on an execution, or to an assignee, and much more to an agent, completes the offence. *Dowell* v. *Vannoy*, 3 *Dev.* 43.

A return by a sheriff of satisfaction to an execution issued on a judgment for a debt infected with usury, is not sufficient evidence of the receipt of the usurious interest to charge the lender in an action for the penalty. It must be shown that the lender has actually *received the usurious interest.* *Wright* v. *McGibbony*, 2 *Dev. & Bat.* 474.

In a suit in the name of common informer to recover the penalty in the statute against usury, it must appear that the payment of money, or other thing sought to be recovered, was a voluntary payment, and made in pursuance of a previous corrupt agreement.

A decree of the county court, in an action of ejectment predicated on mortgage, even after it becomes absolute, and so the debt is paid, does not constitute such payment as will enable the mortgagor or a common informer to recover the excess of lawful interest included in such decree.

By such decree it would seem that the usury is purged, and no subsequent proceedings can be had whereby the question of usury shall be again brought into discussion. If the contracting party never had a right of recovery under that statute, no action can accrue to a common informer. *Steward* v. *Downer*, 8 *Vermont*, 320.

To entitle one to a moiety of the penalty for usury, it must appear on the record, that he prosecuted, complained, or sued for it, and this within a year after the offence committed. The offence of usury is completed, if more than legal interest be paid at the time of the loan, whether the principal sum be ever repaid or not. If the lender on usury acts as agent for another, this will be no excuse for him, especially if he does not disclose the fact at the time of the transaction. *Commonwealth* v. *Frost*, 5 *Mass.* 53.

Where a person has two demands upon another, one arising out of a lawful contract, the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of the payment, the law will appropriate it to the debt recognized by law; and therefore, where distinct sums of money were due, one for goods sold, the other for money lent on an usurious contract, and a payment was made which was not specifically appropriated to either debt by debtor or creditor, it was held that the law would afterwards appropriate such payment to the debt for goods sold. Where a bill of exchange was given for the principal money lent, and interest to become due on a usurious contract, and before the bill became due the lender advanced a further sum of money on the general credit of the borrower, which enabled the latter to pay the bill; it was held, that the payment of the usurious interest was complete as soon as the bill was paid. *Wright* v. *Laing*, 3 *Barn. & Cres.* 165.

In an action brought to recover penalties under the statute of usury, it appeared that the contract was made in one county and the money paid in another; the venue was laid in the county where the contract

was made. *Held*, that it ought to have been laid where the usurious interest was received. *Pierson* v. *McCouran*, 3 *Barn. & Cres.* 700.

In January, 1827, A paid C a premium, in consideration of his having agreed to continue to A on loan for one year a sum of £5,000, at five per cent. interest, payable half yearly, on the 8th of March and the 8th of September. The half year's interest, at the rate of five per cent., on the 8th of March was paid to C. *Held*, that C having then taken, accepted, and received more than five per cent. for the forbearance of £5,000 for half a year, the offence of usury was then complete, and that C did not commit a second offence, by reason of his having received on the 8th of September another half year's interest of five per cent. *Wood* v. *Greenwood*, 10 *Barn. & Cres.* 689.

A borrower who has paid more than the legal rate of interest, is not confined to the remedy given by the statute to prevent usury, but may bring an action of *assumpsit* for money had and received to his use, at common law, to recover the excess of interest; but to entitle him to maintain the action, he must show that he has paid, or offered to pay, all the principal lent with the lawful interest. *Wheaton* v. *Hibbard*, 20 *J. R.* 290.

And where, in such action, the lender does not raise the objection at the trial that the principal and legal interest have not been paid, but rests his defence on other and different grounds, the fact of payment will be intended from his silence, and he cannot afterwards make the objection on appeal or in error. *Ibid.*

In an action *qui tam*, by a common informer, under the second section of the act, the declaration must state that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. *Morrel* v. *Fuller*, 7 *J. R.* 402.

The general form of declaring mentioned in the act is given to the borrower only; but the common informer must set forth his cause of action specially, and state the usury. *S. C.* 8 *J. R.* 218.

PART SECOND.

CHAPTER I.

IN THIS CHAPTER IT IS INTENDED TO GIVE THE STATUTES AGAINST USURY, NOW IN FORCE, IN DETAIL.

SECTION I.

A bill against usury. 37 Henry VIII. chap. 9.

WHERE before this time divers and sundry acts statutes and laws have been ordained had and made within this realm, for the avoiding and punishment of usury, being a thing unlawful, and of other corrupt bargains shifts and chevisances, which acts statutes and laws been so obscure and dark in sentences words and terms, and upon the same so many doubts ambiguities and questions have arisen and grown, and the same acts statutes and laws been of so little force or effect, that by reason thereof little or no punishment hath ensued to the offenders of the same, but rather hath encouraged them to use the same. For reformation whereof be it enacted by the King our Sovereign Lord by the assent of the Lords spiritual and temporal and of the commons in this present parliament assembled and by the authority of the same, that all and every the said acts statutes and laws heretofore made of for or concerning usury shifts corrupt bargains and chevisances and every of them, and all pains forfeitures and penalties concerning the same and every part thereof shall from henceforth be utterly void and of none effect to all intents constructions and purposes.

II. And be it further enacted by the authority aforesaid, That no person or persons of what estate degree or condition soever he or they

be, from and after the last day of January next coming shall by himself factor attorney servant or deputy sell his merchandizes or wares to any person or persons, and within three months next after by himself factor attorney deputy or by any other person or persons to his use and behoof, buy the same merchandizes or wares or any part or parcel thereof upon a lower price, knowing them to be the same wares or merchandizes, that he before did so bargain and sell, upon the pains and forfeitures hereafter limited in this estatute.

III. And be it also enacted by the same authority, That no person or persons of what estate degree quality or condition soever he or they be at any time after the said last day of January next coming by way or mean of any corrupt bargain lone eschange chevisance shift interest of any wares merchandizes or other thing or things whatsoever, or by any other corrupt or deceitful way or mean or by any covin engin or deceitful way or conveyance shall have receive accept or take in lucre or gains for the forbearing or giving day of payment of one whole year of and for his or their money or other things, that shall be due for the same wares merchandizes or other thing or things above the sum of ten pound in the hundred, and so after that rate and not above of and for a more or less sum or for a longer or shorter time, and no more or greater gain or sum thereupon to be had upon the pains and forfeitures hereafter in this act mentioned and contained.

IV. And be it further enacted by the authority aforesaid, That if any person or persons at any time after the said last day of January do bargain and sell, or lay to mortgage by any way or mean any manors lands tenements or hereditaments to any person or persons upon condition of payment or non-payment of any sum or sums of money to be had paid or made at any day certain, or before any such day by him, that shall so bargain sell or lay to mortgage the same manors lands tenements or hereditaments, that the same person or persons, to whom any such manors lands tenements or hereditaments shall be so bargained sold or laid to mortgage, shall not by reason thereof have ne take in lucre or gains of the issues revenues and profits of the same manors lands tenements or hereditaments above the sum of ten pound in the hundred for one whole year, and so after the rate abovesaid for a more or lesser sum or for a longer or shorter time, and no more nor otherwise, upon the pains forfeitures and penalties hereafter in this present estatute limited and expressed.

V. And be it further enacted by the authority aforesaid, That if any person or persons, of what estate degree quality or condition soever he or they be, at any time after the said last day of January

next coming shall do any act or acts thing or things contrary to the tenor form and effect of this estatute, or of any clause article or sentence contained in the same, that then all and every offender and offenders therein or in any part thereof shall forfeit and lose for every such offence the treble value of the wares merchandizes and other thing or things so bargained sold exchanged or shifted, and the treble value of the issues and profits of the said manors lands tenements and hereditaments so had taken or received by reason of any such bargain sale or mortgage, and also shall have and suffer imprisonment of his body and make fine and ransom at the King's will and pleasure; the moiety of which forfeiture of the said treble value shall be to the King, and the other moiety to him or them, that will sue for the same in any of the King's courts by action of debt bill plaint or information, in which action bill plaint or information no wager of law essoin or protection shall be admitted or allowed.

VI. Provided alway and be it enacted by the authority aforesaid, That this act nor any thing therein contained shall not in any wise extend to any lawful obligation indorsed with a condition, nor to any statute or recognisance made and to be made for the payment of a lesser sum, so that the same obligation statute or recognisance be made for a true just and perfect debt, or for the performance of any other true covenants made or to be made upon a just and true intent had between the parties, other than in cases of usury interest corrupt bargains shift or chevisance, ne yet shall extend to any recovery fine feoffment release confirmation or grant made or to be made upon condition with a true intent, other than to such recoveries fines feoffments releases confirmations and grants as shall be made upon condition extending to usury interest corrupt bargains shifts or chevisance, any thing in this statute contained, or any law statute or ordinance heretofore had used or made to the contrary notwithstanding.

SECTION II.

An act against usury. 13 *Elizabeth, chap.* 8.

Whereas in the parliament holden in the seven and thirtieth year of the reign of our late sovereign Lord King Henry the eighth of famous memory, there was then made and established one good act for the reformation of usury, by which act the vice of usury was well repressed, and specially the corrupt chevisance and bargaining by way of sale of wares, and shifts of interest. And where since that time by one other

act made in the fifth and sixth years of the reign of our late sovereign Lord King Edward the sixth, the said former act was repealed, and new provisoes for repressing of usury devised and enacted: which said latter act hath not done so much good as was hoped it should, but rather the said vice of usury, and specially by way of sale of wares and shifts of interest, hath much more exceedingly abounded, to the utter undoing of many gentlemen, merchants, occupiers, and others, and to the importable hurt of the common wealth, as well for that in the said latter act there is no provision against such corrupt shifts and sales of wares, as also for that there is no difference of pain, forfeiture or punishment, upon the greater or lesser exactions and oppressions by reason of loans upon usury.

II. Be it therefore enacted, That the said later statute made in the fifth and sixth years of the reign of King Edward the sixth, and every branch and article of the same, from and after the five and twentieth day of June next coming, shall be utterly abrogated, repealed and made void: and that the said late act made in the said seven and thirtieth year of King Henry the eighth, from and after the said five and twentieth day of June next coming shall be revived, and stand in full force, strength and effect.

III. And be it further enacted, That all bonds, contracts, and assurances collateral or other to be made for payment of any principal or money to be lent, or covenant to be performed upon or for any usury in lending or doing of any thing against the said act now revived, upon or by which lone or doing there shall be reserved or taken above the rate of 10*l.* for the hundred for one year, shall be utterly void.

IV. And be it further enacted, That all brokers, solicitors, and drivers of bargains for contracts or other doings against the said statute now revived, whereupon shall be reserved or taken more than after the rate of ten pound for the lone of one hundred pound for a year, shall be to all intents and purposes judged, punished and used as counsellors, attorneys or advocates, in any case of *præmunire.*

V. And forasmuch as all usury, being forbidden by the law of God, is sin and detestable: be it enacted, That all usury, lone, and forbearing of money, or giving days for forbearing of money, by way of loan, chevisance, shifts, sale of wares, contracts, or other doings whatsoever for gain mentioned in the said statute, which is now revived whereupon is not reserved or taken, or covenanted to be reserved, payed, or given to the lender, contracter, shifter, forbearer, or deliverer, above the sum of ten pound for the lone or forbearing of a hundred pound for one

year, or after that rate for a more or lesser sum or time, shall be from the five and twentieth day of June next coming, punished in form following; that is to say, that every such offender against this branch of this present statute, shall forfeit so much as shall be reserved by way of usury, above the principal for any money so to be lent or forborn. All such forfeitures to be recovered and employed, as is limited for forfeitures by the said former statute now revived.

VI. And be it further enacted, That Justices of Oyer and Determiner, and Justices of assise in their circuits, Justices of peace in their sessions, mayors, sheriffs, and bayliffs of cities shall also have full power and authority to enquire, hear and determine of all and singular offences committed against the said statute now revived.

VII. And be it further enacted, That the said statute now revived shall be most largely and strongly construed for the repressing of usury and against all persons, that shall offend against the true meaning of the said statute by any way or device directly or indirectly.

VIII. Provided alway, That this statute doth not extend, nor shall be expounded to extend unto any allowances or payments for the finding of orphans, according to the ancient rates or customs of the City of London, or any other City where like order is for the custody of orphans and their goods, as is in the said City of London.

IX. Provided always, and be it further enacted by the authority aforesaid, That if any person or persons, shall from and after the said five and twentieth day of June offend contrary to the said statute revived by this present act made in the seven and thirtieth year of the reign of the said late King Henry the eighth: that then all and every such offender and offenders shall and may also be punished and corrected according to the ecclesiastical laws heretofore made against usury. And that all and every person and persons offending in usury, shifts, or chevisance against this present act, and not taking or receiving but only after the rate of ten pounds in the hundred or under, for a year, shall be only punished by the pains and forfeitures provided and appointed by this act, against such as shall not take or receive over and above the rate of ten pounds in the hundred for a year, and not otherwise. This act to continue and endure for and during the space of five years next after the end of this present parliament, and from thence unto the end of the first session of the Parliament then next ensuing.

X. And be it further enacted by the authority aforesaid, That if this present act shall not be continued in the first session of the Parliament next ensuing the said term of five years, and then in the same

session no other statute or provision made against usury or corrupt chevisance: that then all and every the laws and statutes repealed by this act, shall remain and be of such like force and effect, as if this present act had never been had, ne made.

(Made perpetual by 39 Elizabeth, c. 18.)

SECTION III.

An act to reduce the rate of interest, without any prejudice to parliamentary securities. 12 *Anne, stat.* 2, *c.* 16.

Whereas the reducing of interest to ten, and from thence to eight, and thence to six in the hundred, hath from time to time, by experience been found very beneficial to the advancement of trade, and improvement of lands: and whereas the heavy burden of the late long and expensive war, hath been chiefly born by the owners of the land of this kingdom, by reason whereof they have been necessitated to contract very large debts, and thereby, and by the abatement in the value of their lands, are become greatly impoverished: and whereas by reason of the great interest and profit which hath been made of money at home, the foreign trade of this nation hath of late years been much neglected, and at this time there is a great abatement in the value of the merchandizes, wares, and commodities of this kingdom, both at home and in foreign parts, whither they are transported; and whereas for the redress of these mischiefs, and the preventing the encrease of the same, it is absolutely necessary to reduce the high rate of interest of six pounds in the hundred pounds for a year to a nearer proportion with the interest allowed for money in foreign states; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, That no person or persons whatsoever, from and after the nine and twentieth day of September, in the year of our Lord, one thousand seven hundred and fourteen, upon any contract, which shall be made from and after the said nine and twentieth day of September, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent or covenanted to be performed upon or for any usury, whereupon

or whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void; and that all and every person or persons whatsoever, which shall after the time aforesaid, upon any contract to be made after the said nine and twentieth day of September, take, accept and receive, by way or means of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money, or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, and other things, so lent, bargained, exchanged, or shifted.

II. And be it further enacted by the authority aforesaid, That all and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains for contracts, who shall, after the said nine and twentieth day of September, take or receive, directly or indirectly, any sum or sums of money, or other reward or thing for brokage, soliciting, driving, or procuring the loan, or forbearing of any sum or sums of money, over and above the rate or value of five shillings for the loan, or forbearing of one hundred pounds for a year, and so rateably, or above twelve pence, over and above the stamp-duties, for making or renewing of the bond or bill for loan, or forbearing thereof, or for any counter-bond or bill concerning the same, shall forfeit for every such offence twenty pounds, with costs of suit, and suffer imprisonment for half a year; the one moiety of all which forfeitures to be to the Queen's most excellent Majesty, her heirs and successors, and the other moiety to him or them that will sue for the same in the same county where the several offences are committed, and not elsewhere, by action of debt, bill, plaint or information, in which no essoin, wager of law, or protection, shall be allowed.

SECTION IV.

ALABAMA.

Act of December 17, 1819.

SECTION 1. (See Amendment.)

SECT. 2. Every person who, upon any contract, shall take, accept, or receive, by way or means of any corrupt bargain, loan, exchange, or shift of any money, goods, wares, merchandise, commodities, or bonds or notes, or other thing whatsoever, above the rate of eight dollars, for the forbearance or giving day of payment of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time, and so after that rate or proportion for goods, wares, merchandise, commodities, bonds, or notes, when such shall be lent, contracted, or agreed for, taken, accepted, or received, shall forfeit and lose for every such offence, the whole amount or value, together with all interest thereon; one-half of which forfeiture shall be paid into the public treasury for the use of the state, and the other half to him or them that will inform and sue for the same, to be recovered with costs by action of debt, in any court of record in this state: *Provided*, That if the borrower should be the informer as aforesaid, the whole amount thus recovered shall be paid into the treasury for the use of the state: *Provided also*, That every such action of debt as aforesaid, shall be commenced and sued in the lender's lifetime, or within three years after the commission of the offence, or in one year after the time of payment of any money, goods, wares, or merchandise, contracted to be paid on any usurious agreement or contract.

SECT. 3. It shall be the duty of the judges of the Circuit Courts to charge the grand jury of the respective counties within their circuits, to present every person who may violate the provisions of this act that may come within their knowledge; and on every such presentment, it shall be the duty of the solicitor for the state to have issue joined or made up on such presentment, and prosecute the same under the rules and regulations prescribed for the prosecution of *qui tam* actions, and upon conviction, the whole amount thus ascertained to have been lent or taken, contrary to the provisions of this act, shall be paid into the treasury for the use of the state.

SECT. 4. When any note or notes, bond or bonds, shall be upon, or

on account of any usurious contract, the same shall be void and of no effect, and the obligor or obligors for ever exonerated from the payment of the same; and the obligor or obligors shall be deemed by this act competent witnesses to prove the usurious consideration of any such bond or bonds, note or notes: *Provided*, That this act shall not be so construed as to prohibit the sale of any bond or bonds which may have been fairly and *bona fide* given, and not given for the purpose of evading the provisions of this act.

SECT. 5. When any suit or action may be brought in any court of record in this state, touching or concerning any usurious bond, specialty, promise, or agreement, the borrower or party to such usurious bond, specialty, contract, promise, or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence: *Provided*, That if any person against whom such evidence is offered to be given, will deny upon oath, to be administered in open court, the truth of what such witness offers to swear against him, then such evidence shall not be admitted; and if any witness or party shall forswear himself in any such matter, and be thereof lawfully convicted, he or she shall suffer all the pains and penalties by law inflicted on persons convicted of wilful and corrupt perjury.

SECT. 6. Any person or persons who shall be lawfully convicted of violating this act, shall be forever disqualified from being a director of any bank or banks in this state; and any person or persons who may be director or directors of any bank or banks within this state, who may be convicted as aforesaid, shall forfeit his or their seat or seats as director or directors; and any person or persons who may be elected or chosen a director or directors of any bank or banks within the state, before entering upon the duties of his office, shall take the following oath, to wit:

"I, ——— do solemnly swear, (or affirm,) that I have not either directly or indirectly violated the act, entitled 'An act regulating the rate of interest,' nor will I be guilty of violating said act, either directly or indirectly, while I continue in the office of director: so help me God."

Act of 1833.

SECT. 7. It shall not be lawful for the obligor or obligors, maker or makers of any bond or note, on which suit may hereafter be brought, to establish the fact of usury by his, her, or their own oath, where the obligee or payee of such bond or note has departed this

life; but in such cases, shall be required to establish his, her, or their plea of usury, by other testimony.

SECT. 8. Where the borrower or borrowers of any sum of money, or other thing alleged to be on usurious consideration, shall have departed this life before the trial of any suit in which the plea of usury may be filed, it shall be lawful for the legal representative or representatives of such borrower or borrowers, to have the benefit of the fourth section of an act entitled "An act to regulate the rate of interest," passed December 17, 1819, by making affidavit, that he, she, or they believe the contract sued on to be usurious: *Provided*, That this section shall have no force or effect where the lender shall have departed this life: *And provided further*, That if any person against whom such evidence is offered to be given, will deny upon oath, to be administered in open court, the truth of what such witness offers to swear against him, then such evidence shall not be admitted; and if any witness or party shall forswear himself in any such matter, and be thereof lawfully convicted, he, she, or they, shall suffer all the pains and penalties by law inflicted on persons convicted of wilful and corrupt perjury.

Amendment.—An act to repeal in part an act entitled, "An act to regulate the rate of interest," passed December 17, 1819. January 17, 1834.

SECT. 1. *Be it enacted, &c.*, That all contracts whatsoever, which may hereafter be made, to take directly or indirectly for the loan of any money, wares, merchandise, bonds, notes of hand, or other commodities whatsoever, above the value of eight dollars, for the forbearance of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time; and all bonds, contracts, covenants, conveyances, or assurance, hereafter to be made for payment or delivery of any money, goods, wares, or merchandise so to be lent, on which a higher rate of interest is received or taken, shall be void and of no effect for the whole interest only, but the principal sum of money, or the value of the wares, merchandise, bonds, notes of hand, or other commodities whatsoever, shall be recoverable upon all the bonds, contracts, covenants, conveyances or assurances aforesaid.

SECT. 2. *And be it further enacted*, That the second section of the act against usury above named, and every other part of said act, not contrary to the first section of this act, shall be and remain in full force.

For construction and effect of the act of 1818, see 1st Alabama Rep.

by Miner, from 209 to 248, where debt contracted March 1st, 1819, for $100, had interest adjudged, September, 1820, at $187 $\frac{50}{100}$. Debt contracted, June, 1819 for $3,000. Interest, September, 1821, $3,261 22. Debt, 11th June, 1819, for $4,200. Interest, June, 1824, $24,570.

1. Before the correct construction of the act of 1818 was established, judgments were erroneously entered at law, on contracts reserving high rates of interest under that act. Some being voluntarily paid and others sufficiently old to bar writs of error, equity will not interfere. *Jones* v. *Watkins*, 1 *Stewart*, 81.

2. A party seeking relief in equity against a contract as usurious, must show that he had not an adequate remedy at law. *Ibid.*

3. When the defendant offers to prove usury by his own oath, and the plaintiff on oath denies part of the facts stated by the defendant, such statements of the defendant going to prove usury as are not directly denied, are admissible evidence. *Farris* v. *King*, 1 *Stewart* 255.

4. A note made for the purpose of raising money for the maker, and sold at a discount beyond the legal interest is usurious, and the buyer, though ignorant of the original taint, cannot recover on it. *Ibid.*

5. A constable having executions against B, agrees to satisfy them, C giving him his note for a certain sum. The note being for more than the amount of the executions and lawful interest, it is usury, though not called a loan. *Wright* v. *Elliott*, 1 *Stewart*, 391.

6. It is not necessary, to constitute usury that more than eight per cent. be stipulated for; it is sufficient if it be taken. It is usury if unlawful interest is taken, though the party promising is ignorant at the time that he promises more than eight per cent. *Ibid.*

7. Though the interest to be taken by the bank of Alabama is limited by statute to six per cent., yet there is no usury unless more than eight per cent. be taken. Banks may lawfully retain interest in advance on discounting notes. *Lyon* v. *State Bank*, 1 *Stewart*, 442. The rule of the State Bank as to the computation of interest, whereby interest is retained on the new and old notes on days of renewal, and whereby a day is also calculated as one-three-hundred-ands-ixtieth part of a year, is lawful, being sanctioned by universal banking usage.

8. J purchased of T a note which he held made under the statute of 1818, reserving interest at twenty per cent. per month from the time when due until paid, and gave his notes for it, both believing

the high rate of interest recoverable. The notes given by J are not void for usury, though they embrace a part of the high rate in their consideration, and though the high rate was afterwards determined not to be recoverable; that for so much of the high rate of interest included in them there was no consideration, it being penal. *Thompson* v. *Jones*, 1 *Stewart*, 556.

9. Where a note is given upon a compromise embracing more interest than is lawfully due, both parties believing it lawfully due and recoverable, it is not usury. *Ellis* v. *Bibb*, 2 *Stew.* 63.

10. A party cannot be relieved in equity on account of usury, where he has omitted to plead it at law, and shows no excuse for such failure. *Teagen* v. *Russell & Moore*, 2 *Stewart*, 420.

11. A note for a sum certain, payable at a future day, which may be discharged by the payment of a less sum at an earlier, is not usurious on its face, but is valid. *Jordan* v. *Lewis*, 2 *Stewart*, 426.

12. To a plea that the note sued on "was founded on a usurious consideration," a replication that "it was not usuriously agreed that more than legal interest should be received," is bad. *Wright* v. *Martin*, 2 *Stewart*, 453.

13. A brought suit on a note for the use of B, under the statute. C, the defendant, offered to prove by his own oath that the note was made and given to A for an usurious consideration, and that it was made by the advice of B, and with his knowledge, to evade the usury laws. B on oath denied any usury, so far as he was concerned, or knowledge of the usury. It was held, that this was not a sufficient denial of the usury to prevent C from testifying. *Watkins* v. *Watkinson & Co.*, 2 *Stewart*, 485.

14. The statute of 1819, which provides that the borrower may establish a defence of usury by his own oath in certain cases, does not extend to contracts made out of this state, by persons residing in other states. Does the statute operate where the original parties to the contract are dead, equally as if living? (Quere.) *Wilson* v. *Walker*, 3 *Stewart*, 211.

15. That where money is loaned, and a slave is taken as security for its repayment, on a contract that the use of the slave shall go in discharge of the interest; if the value of the services of the slave greatly exceeds the legal rate of interest, the contract is usurious and void. *Hemer* v. *Harrall*, 2 *Stew. & Port.* 323.

16. A note or bill made for the especial accommodation of an individual, to enable him to raise money by its discount at a rate beyond the legal interest, is usurious in the hands of an innocent pur-

chaser, and he cannot maintain an action on it, it being void in its original formation. This although such purchaser be entirely ignorant of the circumstances under which such bill or note be created. The declaration of a person for whose accommodation the paper is made, is not evidence. *Metcalf* v. *Watkins*, 1 *Porter's R.* 57.

17. A, having executed a mortgage of slaves to B, enters into a bond with C and D as his sureties, conditioned to be void if A surrenders the property mentioned therein to B, (if equity shall decree the same of right to belong to B), and that A further abides the decree of equity in a foreclosure; such bond is valid, and not void on the ground of usury, for want of consideration. In order to insure a recovery at law on such bond, it must appear that a decree of equity has been rendered on the precise points contained in the condition. *Barnes* v. *Peck*, 1 *Porter's R.* 187.

18. A court of chancery will not relieve against a judgment at law on the ground of usury, although well established, where it appears that the facts were available to the complainant before the rendition of the judgment at law. *Roxster* v. *Watkins*, 3 *Porter's R.* 436.

19. Usury is complete where a direct loan of money is made, and more than the legal rate of interest is secured for the forbearance of payment. Whatever form, shape, or disguise a contract for the loan of money assumes where the capital is to be returned at all events, a profit made or a loss imposed on the necessities of the borrower (over and above the legal rate of interest) will constitute usury. The intent of the parties to commit usury, where the contract is not upon its face usurious, is to be collected from the circumstances of the case, the situation and object of the parties at the time of the loan, the character of and use to be made of the funds loaned, or article transferred, and the time, manner, and place of repayment. A contract for the loan of money, upon which a note and surety is taken, and which, by the terms of the note, is to be repaid in *another state*, (not containing any agreement as to the particular rate of interest to be charged,) which, after maturity and the insolvency and death of the borrower, is extended by his sureties upon a new contract, under which a higher rate of interest is charged upon the note after its maturity than is authorized by the laws of the state where the note is payable, is usurious. *Ely* v. *McClung*, 4 *Por. R.* 128.

20. A defence of usury, as it avoids a contract, is allowable under a plea of non-assumpsit. But a special plea disclosing particularly the facts proposed to be proved in a defence of usury, is allow-

able; special demurrers not being tolerated in this state. But where a loan is made in New York, and the interest is there paid on it, and a bill is there drawn, payable in Alabama, for the amount of the loan with usury, the law of the former state furnishes the criterion by which it is to be determined whether the contract is usurious. It is incumbent on an endorser of negotiable paper, if he would prevent usury from being set up against him, to show that he became the innocent holder of the paper, for a valuable consideration, before its maturity. *Hancock* v. *Andrews*, 9 *Porter's R.* 9.

21. The courts of one state cannot judicially know what are the laws of another. The courts of this state will give effect to a contract according to the law of the place where it is to be performed, *unless* it violates some law of the *lex fori*, or comes in contact with the established policy of the country; but the remedy is governed by the law of the *lex fori*. Every endorsement is a new contract. *Givens* v. *the Western Bank of Geo.* 2 *Alabama*, 397.

22. Where a note is made for the purpose of being sold by the payee at a greater discount than the legal rate of interest, and is sold to one who is ignorant of the purposes for which the note was made, the latter is not chargeable with usury, and although the note in his hands would be liable to be scaled to the amount paid for it, as having no other consideration to support it, yet if the parties subsequently give a new note, the defence arising out of the consideration cannot be made, as it is equivalent to a new promise to pay, without disclosing the defect in the consideration. *Cameron & Johnson* v. *Wall*, 3 *Alabama*, 158.

23. Usury is a defence personal to the party agreeing to pay it, or those who stand in his place as representatives. *Fenno et al.* v. *Sayre & Converse*, 3 *Alabama*, 458.

24. The statutes against usury were intended for the benefit of the borrower; they confer a personal privilege on him, which he may waive, and if he does, no one else can take advantage of them. *Cook & Carnejay* v. *Dyer*, 3 *Alabama*, 643.

25. D held a deed of trust of C, on land and slaves, more than sufficient to satisfy a debt due from C, but consisting entirely of usurious interest. C & K had also a deed of trust on the same property, to secure to them a debt due from C, but subsequent in point of time to the deed of D. By an arrangement entered into by all the parties, C & K accepted a bill of exchange drawn on them by C in favor of D, on condition that D should enter satisfaction on the record of his deed of trust, which he accordingly did; and C & K sold the

property conveyed thereby, and appropriated to the payment in part of their debt due from C. *Held*, that in a suit by D against C & K on their acceptance, they could not set up the usury in the transaction between D and C to defeat the action. *Cook* v. *Dyer*, 3 *Alabama*, 643.

To avoid a security by reason of usury, the contract itself must be usurious to make it void. 2 *Mod.* 307.

New York, *March* 11, 1837.

Exchange for $7,287 $\frac{75}{100}$.

26. Sixty days after date of this my first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth, or order, seven thousand two hundred and eighty-seven $\frac{75}{100}$ dollars, negotiable and payable at the bank of Mobile, value received, which place to the account of Your obedient servant,

D. CARPENTER.

To Messrs. SAYRE, CONVERSE & Co.
Mobile, Ala.

H. M. Andrews & Co. were merchants residing in the city of New York; and when the above bill was drawn the defendant had become liable to H. M. Andrews & Co., as endorsers upon a former bill for $6,000, drawn by E. Hendricks on Daniel Carpenter of Montgomery, Alabama; the last mentioned bill was dated at New York, and fell due on the 21st February, 1837, and was protested for non-payment. The defendant, Pond, it seems was in New York in the month of March, 1837, shortly after this protest, when H. M. Andrews & Co. threatened to sue him on the protested bill. And the defendant, Pond, rather than be sued in New York agreed to pay H. M. Andrews & Co. ten per cent. damages on the protested bill, and ten per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill. Accordingly, defendant, Pond, delivered to H. M. Andrews & Co. the bill of exchange, endorsed by the defendant in blank, on which suit was brought. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection; the drawees refused to accept, and it was protested for non-acceptance; and after this protest it was transferred by S. Andrews to J. J. Andrews, the present plaintiff.

The suit was brought in the United States Circuit Court for the Southern District of Alabama. Defence, usury under the laws of New York. Verdict for defendant. Plaintiff prosecuted a writ of error to the Supreme Court of the United States, and per Curiam, Taney, Chief Justice:

The defendants allege that the contract was not made with reference to the laws of either state, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange in order to evade the law. Now, if this defence is true, the question is not which law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement which neither will execute. Unquestionably it must be the law of the state where the agreement was made and the instrument taken to secure its performance.

In fine, if the parties intended to allow no more than a fair rate of exchange, testing it by the market price of good bills of this description, it was not usury. If, on the contrary, more was intended, it was usury. It is true, that after this bill had been negotiated between H. M. Andrews & Co. and the defendant, other persons might have lawfully purchased it at a much greater discount than the market rate of exchange. But, as between the debtor and his creditor, no difference in the rate of exchange can be made on that account. If, in consideration of further forbearance, the creditor receives a new security from his debtor for an existing debt, he cannot enlarge the amount due by exacting any thing, either by way of interest or exchange, on account of the additional risk he may suppose he runs by this extension of credit, nor on account of any doubt he may entertain as to the punctuality of payment, or the ultimate safety of his debt.

There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is no doubt influenced by it. But it is also materially affected by the state of trade, by the urgency of the demand for remittances, and by the quantity brought into market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expense of transporting specie. The Court can therefore lay down no rule upon the subject. Whether they exacted any more or not for the forbearance of their debt, is a question for the jury to decide; and in order to enable them to do it correctly, they must be allowed to hear evidence which either of the parties may offer, as to the rates of exchange for such a bill as this, which was payable in specie, and not in any depreciated currency. *Andrews* v. *Pond*, 13 *Peters*, 65.

SECTION V.

ARKANSAS.

Revised Statutes, page 469, *chap.* 80.

INTEREST.

SECTION 1. Creditors shall be allowed to receive interest at the rate of six per centum per annum, when no other rate of interest is agreed upon, for all moneys after they become due by any instrument of the debtor, in writing, on money lent, on money due on settlement of accounts, from the day of liquidating or ascertaining the balance due thereon, on money received for the use of another and retained without the owner's knowledge of the receipt thereof, on money due and withheld by unreasonable and vexatious delay of payment or settlement of accounts, and on all other moneys due and to become due for the forbearance of payment, whereof an express promise to pay interest has been made.

SECT. 2. The parties may agree, in writing, for the payment of interest not exceeding ten per centum per annum, on money due or to become due, upon any contract, whether under seal or not.

SECT. 3. Interest shall be allowed on all moneys due on judgments at law or decrees in equity, from the day of the rendition thereof until satisfaction be made by payment or sale of property.

SECT. 4. Judgments or decrees upon contracts, bearing more than six per cent. interest, shall bear the same interest as may be specified in such contracts; and the rate of interest shall be expressed in all such judgments and decrees, and all other judgments and decrees shall bear interest at the rate of six per centum per annum, until satisfaction is made as aforesaid.

SECT. 5. No person or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan or forbearance of any money, goods, or things in action, than is in this act prescribed.

SECT. 6. Every person, who for any such loan or forbearance shall pay any greater sum or value than is in this act allowed to be received, or his personal representatives may recover in an action against the person who shall have taken or received the same, or his personal representatives, the amount of money so paid, or value delivered, above

the rate aforesaid, if such action be brought within one year after such payment or delivery.

SECT. 7. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatsoever, whereupon or whereby there shall be reserved, taken, or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, or things in action, than is prescribed in this act, shall be void.

SECT. 8. The provisions of the preceding section shall not extend to any bills of exchange or promissory notes in the hands of an endorsee or holder, who shall have received the same in good faith, and for a valuable consideration, and who had not at the time of discounting or receiving such bill or note, or paying such consideration for the same, actual notice that such bill or note had been originally given for a usurious consideration, or upon a usurious contract.

SECT. 9. Every person offending against the provisions of this act, shall be compelled to answer, on oath, any bill that may be exhibited against him in Chancery, for the discovery of any such sum of money, goods, or things in action, so taken, accepted, or received, in violation of the provisions of this act, or any of them.

SECT. 10. For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month, shall be estimated by the proportion which such number of days shall bear to thirty.

SECT. 11. In calculating interest where partial payments may have been made, the interest shall be calculated to the time when the first payment shall have been made, and such payment shall be applied to the payment of such interest; and if such payment exceed the interest the balance shall be applied to diminish the principal, and the same course shall be observed in all subsequent payments; but in no case where a payment shall fall short of paying the interest due at the time of making such payment, shall the balance of such interest be added to the principal.

SECT. 12. Whenever, in any statute, deed, written or verbal contract, or in any public or private instrument whatever, any certain interest is or may be mentioned, and no period of time is stated for such rate of interest to be calculated, interest shall be calculated at the rate mentioned by the year, in the same manner as if the words "per annum" or "by the year" had been added to such rate.

Approved, February 16, 1838.

Under the Territorial law concerning interest, if a party contracted for a higher rate of interest than six per centum per annum, he could only recover the principal, unless the rate of interest was stipulated in the contract, in writing; in which case it might be as high as ten per cent. If the rate of interest, stipulated in writing, was higher than ten per cent., only the principal could be recovered. 4 *Arkansas Rep.* 422.

We know of no law that authorizes a party to recover a greater rate of interest than six per cent., unless so expressed upon the face of the contract, and then it cannot exceed ten per cent. 4 *Arkansas Rep.* 456.

SECTION VI.

CONNECTICUT.

Revised Statutes, page 651. *Passed May,* 1838.

SECT. 1. *Be it enacted, by the Senate and House of Representatives in General Assembly convened,* That no person, or persons, upon any contract, shall take, directly or indirectly, for the loan of money, or any goods, wares, or merchandise, or any property whatever, above the value of six dollars for the forbearance of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time; and all bonds, contracts, mortgages, and assurances whatever, made for the payment of any principal or money lent, or covenanted to be lent, upon or for usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars for the hundred, as aforesaid, shall be utterly void.

SECT. 2. Every person who shall take, accept and receive, by means of any corrupt bargain, loan, or exchange, or deceitful conveyance, or by any other means, for the forbearance or giving day of payment for a year, of and for money, or any other property above the sum of six dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum, or for a longer or shorter time, shall forfeit the value of the money or other property so lent, bargained, sold, or agreed for, one half to him who shall prosecute to effect, and the other half to the treasurer of the state.

SECT. 3. And in any action brought on any bond, bill or mortgage, or any contract whatever, it shall be lawful for the defendant to inform the court before which the action is pending, by filing his

complaint with the clerk on the second day of the session of the court, that such contract was given on a usurious consideration; and in that case the court shall proceed to inquire into the truth of such complaint, as a court of equity, and may examine the parties on oath, and may receive any other proper testimony; and if the plaintiff shall refuse to be examined on oath, he shall become nonsuit, and the defendant shall recover his costs. And if the court shall find that the contract was given upon usurious consideration, they shall proceed to adjust the same in equity, and shall give judgment for the plaintiff, to recover no more than the value of the goods, or the principal sum of money which the defendant received, without interest, or any advance on the same. And the like proceedings may be had in any cause pending before a justice of the peace.

1. Action upon note; upon issue joined, verdict that the obligation was given for the loan of $16,839, in *final settlement certificates*, and that it was corruptly agreed between plaintiff and defendant, to give the plaintiff $1000, in lawful money, for said loan for the term of six months, more than the lawful interest, and that said contract was usurious. Motion in arrest: held by the court, that such agreement was not usurious, because it was not for the payment of a *greater value* than the amount of the loan, with an advance thereon, at the rate of six per cent. per annum. That, if it be of greater quantity, though of the same kind of article, is not sufficient; if the article be of a fluctuating value, it may not at the time of repayment *be* worth more or so much. The contract in this case, though in the form of a loan, was really in nature of a speculation and bargain of hazard. It depended on a contingency, viz., that of depreciation, whether all or how much of the principal or value loaned should be repaid, and which of the parties the speculation should ultimately favor, which takes the contract entirely out of the statute. Judgment for plaintiff, *non obstante*. *Hamlin* v. *Fitch*, *Kirby's Reports*, 260.

This was reversed by the Superior Court of Errors, October, 1789. 1 *Root*, 110.

2. It is inadmissible for a defendant to file a bill of usury against an obligation after a trial by jury and a new trial granted.

The defendant is not admissible as a witness to substantiate his bill filed upon the statute. The defendant cannot avail himself of both remedies. *Fleming, Ex'r of McDonald* v. *Bates*, 1 *Root*, 129.

3. Petition in Chancery to foreclose the equity of redemption in certain mortgaged premises. *Held*, that a bill of usury may be filed against a petition to foreclose, as an answer, or a cross bill may be

filed by defendant to have the benefit of petitioner's testimony. *Watson* v. *Geylard*, 1 *Root*, 137.

4. Action upon note. Plaintiff died after service and before return of writ. *Held*, that defendant could not introduce himself as a witness to prove his own bill filed against the obligation on the second day of court's sitting upon the statute of usury. The original promisee being dead, who alone could call defendant as a witness, may be the misfortune of the defendant, but doth not alter the law. *Livingston* v. *Bird*, 1 *Root*, 255.

5. Action on note. Defendant filed his bill against the note on the statute of usury, and moved to be admitted his oath to prove it. By the court not allowed. Defendant then moved for liberty to withdraw his bill, and plead the statute in avoidance of the whole note, which was allowed by the court. *Wadsworth, Whitman & Chaplin* v. *Champion*, 1 *Root*, 367.

6. In a sale of public securities, where the defendant has his election to return them at a certain time, or to pay a certain sum for them, this is not usurious, nor is there any room for chantering as to the damages. In this case, however, the action was on a note, and the plaintiff gave a counter writing to receive the certificates in payment at a certain time. Defendant positively charged usury in the agreement. P. Dyer, Justice, dissenting, upon the ground that the averments were positive, and the facts should have been submitted to proof. But by the court not allowed, and judgment for plaintiff. 1 *Root*, 393.

7. Action upon note, dated May 4th, A. D. 1790, for £400, payable in final settlement notes within one year from date. Usury pleaded; the note was all the evidence to the jury. Verdict for plaintiff, £350 damages. *Patten* v. *Thompson*, 1 *Root*, 526.

8. A parol promise to pay more than lawful interest, made at the giving of a note for a just debt and lawful interest, to induce the creditor to take it, is a part and parcel of the contract, and will make the note usurious and void; the whole contract is corrupt, it being one entire agreement, and not to be distinguished. Affirmed by Superior Court of Errors. *Alwood* v. *Whittlesey*, 2 *Root*, 37.

9. A security taken for six per cent. in specie for the interest on soldier's note, not usurious. But be that as it may, the verdict swept away all corruption of usury in the case. *Hobart* v. *Horton*, 2 *Root*, 47.

10. Superior Court of Errors, 1807. *Kent* v. *Phelps*. In the court below, Phelps sued Kent on a promissory note. The defence, usury. Evidence: Thomas Service of New York, sent to Staples of New Haven, where the defendant lived, an account for collection.

Defendant could not pay, and required time. Staples refused to give time, unless the defendant would include his expenses, and seven per cent. interest on the account, and threatened to attach his property. Defendant assented to the terms, gave his note to Oliver L. Phelps, endorsed, including $12 or $13 expenses, and seven per cent. interest on the account up to the end of ninety days, then future. The account was for merchandise and a note executed in New York, Verdict for plaintiff, by direction of the court. Now *reversed*, because the question of usury, or the fact of including seven per cent., being a cover for usury, was a question for the jury and not of law. 2 *Day*, 483.

11. A, being indebted to B by bond, was arrested in New York, and to secure the bond, made a mortgage of land in this state to B; after which C paid the bond, and took an assignment of the mortgage. *Held*, that A could not redeem without paying to C the sum actually advanced by him, *and seven per cent. interest. Per Curiam.* We admit the rule to be, that the assignees of a mortgage, purchasing without the concurrence of the mortgagor, shall relinquish it upon payment of the original debt and simple interest. But if the purchase be made at the request of the mortgagor, interest shall be turned into principal; such is the rule laid down in *Ashenhurst* v. *Jones*, 2 *Atkins*, 371. *Mallory* v. *Aspinwall*, 2 *Day*, 280.

12. A corrupt agreement, in which the minds of the parties meet, is necessary to constitute usury. Therefore, where more than lawful interest was reserved with the knowledge of the lender, but without the knowledge of the borrower, it was held that the transaction was not usurious. *Smith* v. *Beach*, 3 *Day*, 268.

13. If a usurious security be given up, and a new security taken for the principal sum due and legal interest, the latter will be good. The moral obligation, which the borrower of money at usurious interest is under to pay the principal sum due and legal interest, is a sufficient consideration to support a promise by him to pay such principal and interest. *Kilbourn* v. *Bradley*, 3 *Day*, 356.

14. In an action *qui tam* for taking excessive usury, the declaration stated the taking to have been in pursuance of a loan of $200, by means of a promissory note, and the evidence was of a loan of $200 *and the interest thereon for more than six months. Held*, that this was a material variance.

An amendment will not be allowed in an action *qui tam* to recover the penalty for an offence which, at the time of making the motion, is barred by the statute of limitations. *Drake* v. *Watson*, 4 *Day*, 37.

15. In an action *qui tam* for usury, the plaintiff alleged a loan by the defendant to A for sixty-three days, and produced in evidence a note, executed by A and B jointly and severally, payable to the defendant in *sixty* days, held to be a fatal variance. *Wilmot* v. *Munner*, 4 *Day*, 114.

16. In an action against the *endorser* of a promissory note, the maker, for whose accommodation the defendant endorsed the note, and who executed a mortgage deed to the defendant as a security, was held to be an inadmissible witness for the defendant to support a defence of usury, being interested in the event of the suit. *Cowls* v. *Wilcox*, 4 *Day*, 108.

17. In pursuance of a corrupt agreement, A loaned a sum of money to B, and took his note, reserving a usurious interest, payable in thirty days, and endorsed by C and D as sureties. When this note became due, it was agreed between C and A that A should give it up to C; in consideration of which C would give A his note, payable in ninety days, and endorsed by D. Afterwards, while the first note remained in the hands of C and the second in the hands of A, both unpaid, it was corruptly agreed between A, B, and C, upon a usurious consideration, that A should give further day of payment for the amount of the second note, to be secured by D's note, payable to C, and endorsed by C to A; in consideration of which, C was to give up the first note to B, and A the second note to C. This arrangement was carried into effect. In an action on the last note, in the name of C against D, the defendant pleaded usury, stating these facts, and it was held to be a good defence. *Fields* v. *Goram*, 4 *Day*, 251.

18. A loaned to B $800, and as security takes an absolute deed of a piece of land of much greater value than the sum loaned, under a parol agreement that B may redeem the land upon repayment of the loan, *with interest at twelve per cent. per annum*, and that B shall hold possession of the land and pay to A $48 per annum for the rent. B afterwards executes to A his promissory note for the simple interest of the money loaned under the name of rent. *Held*, that such transaction is usurious, and the note void. *Michell* v. *Preston*, 5 *Day*, 100.

19. A made his promissory note to B, upon a usurious agreement. B transferred the note to C. In a suit on the note against A, in the name of B, A, with a full knowledge of the transfer, procured and pleaded the release of B, in bar; whereupon C brought his action against A for the fraud. *Held*, that such action was not sustainable, on the ground that the note was usurious. *Bacon* v. *Norton*, 5 *Day*, 128.

20. Where the security given in pursuance of a usurious agree-

ment was a bill drawn upon and accepted by A, payable to and endorsed by B, without notice of the usury; it was held that B, who had paid the amount of the bill to an endorsee, could not recover against A, either in an action on the bill or in a count for money paid to the defendant's use. A party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it usurious in its creation. *K. & E. Townsend* v. *Bush*, 1 *Conn.* 260.

21. The sale of a promissory note, endorsed by the seller at a discount exceeding the lawful rate of interest, is not in all cases usurious, but it is *prima facie* valid; and it is incumbent on the party claiming it to be usurious to show the circumstances which bring it within the statute. In an action against the maker of a promissory note, which was valid in its inception, brought by an endorsee, who took of the payee on a usurious consideration, the defendant may avail himself of such intermediate usury to impeach the plaintiff's right to sue. *Lloyd* v. *Keach*, 2 *Conn.* 175.

22. To take a compensation exceeding the lawful rate of interest for obtaining money at a bank, on one's own security, for the use of another, is not usury. If such compensation be unreasonable and extravagant, though it will not necessarily contaminate the contract with usury, yet it may furnish evidence of an intent in this way to cover an usurious loan; and whether the transaction is, in its nature and design, a compensation for time, trouble, and expense, or a cover for usury, is a question of fact to be submitted to the jury. *Hutchinson* v. *Henner*, 2 *Conn.* 341.

23. A held a promissory note, given by B on a usurious consideration, and endorsed by C as his surety. B, being in failing circumstances, C applied to A for the note, that he might secure it out of B's estate, and offered to give A his own note for it, which was agreed to and done. *Held*, that C's note so given was usurious; the transaction being a mere substitution of one security for another, by parties to the original usury. And afterwards C obtained payment of B's note by a suit thereon against him, and was thereby fully indemnified; in consideration of which he, C, gave a new note to A for the amount. *Held*, that the latter note was not usurious. *Botsford* v. *Sanford*, 2 *Conn.* 276.

24. A, having given a usurious security, paid the amount thereof to B, who was surety for him, and B, in consequence of such payment, gave his own note to the creditor for the same amount. *Held*, that the latter note was given on a new consideration, and was uninfected with usury. *Scott* v. *Lewis*, 2 *Conn.* 132.

25. Where A, being a *bona fide* purchaser, for a valuable consideration, of a note infected with usury given by B to C, gave up that note, and in consideration thereof B gave a new one to A for the same amount; it was held that the latter note was not usurious. *Church* v. *Tomlinson*, 2 *Conn.* 134.

26. The defendant, in an action *qui tam* for taking usury, having placed his defence on the ground that the sum received by him beyond the lawful interest was a compensation for time, trouble, and expense, in obtaining the money from certain banks and running his note, offered in evidence sundry notes signed by him, payable at the banks specified, corresponding in date and amount with the statement, which after being discounted at such banks had been duly paid by the defendant, and were respectively endorsed, *paid at the bank: Held*, that these notes were admissible, as they conduced to prove the fact on which the defence rested.

In the same action, on a loan of $850, secured by a note of $950, dated October 2d, 1811, the plaintiff offered to prove that in March, 1813, the plaintiff agreed with the defendant to pay, and afterwards did pay, unlawful interest on a balance at that time due on said note. *Held*, that such evidence was irrelevant, because it was not the fact charged in the declaration. 2 *Conn.* 341.

27. Where a second mortgagee, on an application in Chancery for a foreclosure, wishing to avoid a prior mortgage, offered evidence of usury in that mortgage, without having made any allegation of usury in his bill; it was held, that the evidence, for want of such allegation, was inadmissible. Some argument in this case as to the right of second mortgagee to avoid the first mortgage for usury at all. *Baldwin* v. *Norton et al.* 2 *Conn.* 161.

28. In an action on a promise *to pay* $88, *in current bank bills, such as pass at Norfolk between man and man*, to which the defence was usury; the defendant having proved that the consideration was only $80 in specie, the plaintiff, to repel this defence, offered to prove that such bills, at the date of the contract, were worth ten per cent. less than their nominal amount. It was held, that this was a promise to deliver bank notes of the specified description to the nominal amount of $88, and that therefore such evidence was relevant and proper. *Phelps et al.* v. *Riley*, 3 *Conn.* 266.

29. In an action of ejectment, evidence of usury in the consideration of a mortgage deed, by virtue of which the plaintiffs claim title, was held to be admissible as a defence under the general issue without notice. A general notice of usury, without stating therein the

facts relied on, in a case in which notice is necessary, is insufficient. *Holton* v. *Button*, 4 *Conn.* 436.

30. A sheriff having demanded payment of an execution in his hands against the defendant, which was nearly out, the defendant made his promissory note, payable to the order of a third person, and by him endorsed in blank, and delivered it to the sheriff, contracting with him, that if the defendant, should not pay the execution in ten days, it might be sold in market, or otherwise disposed of, and the avails applied in payment of the execution. After the expiration of the ten days, the execution remaining unpaid, the sheriff delivered the note in the state in which he received it to the plaintiffs, on their advancing to him a sum of money less than the face of the note, by more than the legal interest for the time the note had to run. *Held*, that the note so received by the sheriff was in security of the execution, that he had an interest in it, coupled with a power to sell, and that, consequently, it was an effective instrument in his hands; and not being usurious in its original concoction, it did not become so by the subsequent sale to the plaintiffs. *Tuttle & Holt* v. *Clarke*, 4 *Conn.* 153.

31. When an instrument contaminated with usury is taken up, and a new one substituted by the parties to secure to the creditor the original debt, the substituted as well as the original security is usurious and void. And it makes no difference, whether the party in whose name the substituted security is given, was privy to, or ignorant of the original corrupt agreement. *Wales* v. *Webb*, 5 *Conn.* 154.

32. The borrower of money on an usurious consideration may waive the benefit of the statute by making payments; and if he pay the usurious debt to a third person, a new security given by such third person in consideration thereof, will, in the absence of any contrivance to evade the statute, be valid.

Therefore, where A took the promissory note of B, on an usurious consideration, and afterwards, in pursuance of an agreement between them, B substituted the bond of C, procured from C in consideration of B's promising to pay him the amount thereof, which B in fact paid; it was held that this transaction amounted to a voluntary waiver of the statute by B, and that such bond executed on a new consideration, and with no design in any one to evade the statute, was valid. *Wales* v. *Webb*, 5 *Conn.* 154.

33. The principal sum for which the plaintiff is entitled to judgment in an action on a promissory note after a bill of usury under the statute filed by the defendant and a finding in his favor, is the sum

justly due on such note without the allowance of interest on that instrument. Therefore, where A, in 1806, loaned a sum of money to B, on usurious interest, secured by B's note; and at the end of each successive year, a new note was taken for the amount of the next preceding note, including usurious interest until 1819, when a new note was taken for the amount of the last note, bearing lawful interest; an action being afterwards brought by A on the note, B filed his bill of usury; and the court, upon these facts, having expunged all the usurious interest, and the lawful interest on the note in suit, rendered judgment for the plaintiff to recover the sum of money originally loaned in 1806, and lawful interest thereon, compounded annually until the date of the note in suit. It was held that such judgment was correct. *Sheldon* v. *Steeve*, 5 *Conn.* 181.

34. An absolute deed of land, given to secure the repayment of money loaned on usurious interest may, as between the parties to such deed, be avoided by parol proof of the usury. *See* 5 *Day*, 100.

35. But no person other than the oppressed party to a usurious contract, can avoid such contract on the ground of usury. *Reading* v. *Weston*, 7 *Conn.* 409.

36. Usury may be shown as a defence to a bill of foreclosure. *Cowls et al.* v. *Woodruff et al*, 8 *Conn.* 35.

37. Where a note made in 1825 for discount at the Eagle Bank, was discounted by that institution upon the principle of *Rowlett's Tables*, reckoning sixty days as the sixth of a year, and three days as the tenth of a month, it was held, that whether such note was usurious in its inception or not, the defence of usury (assuming its existence) was taken away by the validating act of 1827, which makes such mode of casting interest valid, if no other usury is contained therein. *Savings Bank* v. *Bates*, 8 *Conn.* 505.

38. Where it was agreed between A, a commission merchant in New York, and B, a country trader, that on being furnished with a letter of indemnity, A would become responsible to a limited amount, and charge for lending his name, if put in funds in time to meet the payment, half a per cent., and two and a half per cent. in all cases of advance; and it appeared that the latter charge was intended by the parties as a fair compensation to A for his trouble in providing for acceptances which it was the duty of B to pay, and not as a cover for usurious loan; it was held that the commissions charged under such agreement were not usurious—on jury finding—*Defaut et al.* v. *Strong*, 8 *Conn.* 513.

39. There is a settled distinction between usurious contracts

which are void, both in law and equity, and oppressive contracts, which a court of equity will refuse to enforce or will set aside. *Camp.* v *Bates*, 11 *Conn.* 487.

A contract to receive a reasonable compensation for endorsing the notes of another, payable at the banks, is not of itself usurious, though as such contracts are liable to be perverted to usurious purposes, they are to be viewed with great jealousy. *Beckwith* v. *the Windsor Manufacturing Company*, 14 *Conn.* 594.

In such cases, the intent of the parties making the contract must govern, and that intent is a matter of *fact*, proper to be submitted to a jury, the court having no rule by which to determine, as matter of *law*, what compensation may be lawful and what usurious. *Ibid.*

Where it was agreed between A and B, that A should endorse B's notes, payable at the banks from time to time as B should require, for the term of one year, to an amount not exceeding in the whole, at any one time, the sum of $15,000, and should also during the time advise B's agent respecting his financial affairs, as far as he could consistently with his other engagements; and for A's endorsement and services B was to pay him a sum equal to six *per cent. per annum* on the amount of his endorsements, from the time such notes were given until they should be taken up by B; and it was found that the contract fairly expressed the intention of the parties; that it was not designed by them to be a contract for the loan of money, and that the sum stipulated to be paid to A for his endorsements and services was no more than a fair and reasonable compensation therefor, having reference to the general embarrassments of the country at the time, and the kind of security agreed to be given; it was held, 1st. That the contract was not upon its face usurious. 2d. That the presumption resulting from the terms of the contract, and especially the peculiar manner in which A's remuneration was to be made, that it was designed as a cover for a usurious loan, was repelled by the finding. *Ibid.*

SECTION VII.

DELAWARE.

An act for reducing the interest of money from eight to six per cent. per annum.

SECTION 1. No person shall directly or indirectly for any bonds or contracts to be made after the publication of this act, take for the loan

or use of money or any other commodities above the value of six pounds for the forbearance of one hundred pounds, or the value thereof for one year, and so proportionably for a greater or lesser sum; any law, custom, or usage to the contrary notwithstanding.

SECT. 2. If any person or persons whatsoever do or shall (after the publication of this act) receive or take more than six pounds per cent. per annum on any such bond or contract as aforesaid; upon conviction thereof, the person or persons so offending shall forfeit the money and other things lent, the one-half thereof to the governor for the support of government, and the other half to the person who shall sue for the same by action of debt, bill, plaint, or information, in any court of record within this government, wherein no essoign, protection, or wager of law, nor any more than one imparlance, shall be allowed.

SECTION VIII.

FLORIDA.

[The act concerning usury and interest, approved August 31, 1822. Acts to regulate the rate of interest, November 21, 1829. Supplementary act, November 21, 1829. Act, February 8, 1832, virtually repealed by act of February 12, 1833.]

Chapter 661, (No 4.) An act regulating the rate of interest.

SECTION 1. *Be it enacted by the Governor and Legislative Council of the Territory of Florida*, That from and after the passage of this act, no person or persons shall, upon any contract whatever, take directly or indirectly, for the loan of any money, wares, merchandise, bonds, notes, or other commodities whatsoever, above the rate of ten dollars for the loan of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time; and all bonds, contracts, covenants, conveyances or assurances, hereafter to be made, for payment or delivery of any money, goods, wares or merchandise, to be lent, on which a higher rate of interest is received or taken than is hereby allowed, shall forfeit the amount of said interest: *Provided*, that when no rate of interest be expressed, no higher rate than eight per centum shall be charged.

[Interest on judgments. Vide act of February 12, 1831.]

SECT. 2. *Be it further enacted*, That every person, who upon any contract shall take, accept or receive, by way or means of any corrupt bargain, loan, exchange or shift, of any money, goods, wares, merchandise, or lands, notes, or other things whatsoever, above the rate

of ten dollars for the forbearance or giving day of payment, of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time; and so after that rate or proportion for goods, wares, merchandise, commodities, bonds or notes, when such shall be lent, contracted, agreed for, taken, accepted or received, shall forfeit and lose for every such offence, the whole amount of interest then due, one-half of which, for the future, shall be paid into the treasury of the county in which such offence shall be committed, and the other half to him or them who will inform and sue for the same, to be recovered, with costs, by action of debt, in any court of record in this Territory: *Provided*, that if the borrower should be the informer, as aforesaid, then and in that case, the whole amount thus recovered shall be paid into the treasury for the use of the county.

[SECT. 51. Act regulating judicial proceeding relating to interest on judgments, repealed by this act.]

SECT. 3. *Be it further enacted*, That when any note or notes, bond or bonds, shall or may be upon or on account of any usurious contract, the interest on the same shall be void, and the obligor or obligors forever exonerated from the payment of the same, and the obligor or obligors shall be deemed by this act competent witnesses to prove the usurious consideration of any such note or notes, bond or bonds: *Provided*, this act shall not be construed, so as to prohibit the sale of notes or bonds which may have been fairly or *bona fide* given, and not given for the purpose of evading this act.

SECT. 4. *Be it further enacted*, That in all cases whatsoever, when any suit or action shall be brought in any court of record in this Territory touching or concerning any usurious bond, specialty, promise or agreement, the borrower or party to such usurious bond, specialty, promise or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence: *Provided*, that if any person, against whom such evidence is offered to be given, will deny upon oath, to be administered in open court, the truth of what such witness offers to swear against him, then such evidence shall not be admitted; and if any witness or party shall forswear him or herself, and be thereof lawfully convicted, he or she shall suffer all the pains and penalties by law inflicted on persons convicted of wilful and corrupt perjury.

SECT 5. *Be it further enacted*, That from and after the first day of March next, any person or persons who shall be convicted of violating this act, shall be, and he is hereby forever disqualified from being a

director of any bank or banks in this Territory, and any person or persons who may, after the passage of this act, be elected or chosen director of any bank in this Territory, before entering on the duties of his office, shall take the following oath, to wit, "I, ———, do solemnly swear (or affirm) that I have not, either directly or indirectly, violated the act entitled, 'an act regulating the rate of interest,' nor will I be guilty of violating said act, directly or indirectly, while I continue in the office of director, so help me God."

SECT. 6. *Be it further enacted*, That it shall be the duty of the judges of the Superior Court to charge the grand juries of their respective counties within their district, to present all and every person who may violate the provisions of this act that may come within their knowledge; and on every such presentment, it shall be the duty of the district attorney to prosecute the party presented, for the amount of interest by this act forfeited, either in an action of debt, in the name of the Territory, or upon information filed; and in every such case, where the said district attorney shall prosecute the said action or information to effect, there shall be taxed in his favor, in the bill of costs against the defendant, a fee of fifteen dollars.

SECT. 7. *Be it further enacted*, That all laws and parts of laws, conflicting with the true intent and meaning of this act be, and the same are hereby repealed. And that this act shall be in full force from and after the first day of March.

Approved February 12, 1833.

SECTION IX.

GEORGIA.

An act to alter and amend an act entitled, An act for reducing the interest of money in this province, passed March twenty-seventh, seventeen hundred and fifty-nine, so far as relates to usurious contracts.—This act passed 23d December, 1822.

SECTION 1. All contracts, bonds, notes, and assurances whatsoever, made after the passage of this act, for the payment of any principal or money, goods, wares, or merchandise, or other commodities whatsoever, to be lent, covenanted to be performed upon, or for any usury, whereupon or whereby there shall be reserved or taken above the rate of eight per centum per annum, shall not be void, but the principal due thereon shall be recoverable at law, and no more.

SECT. 2. No forfeiture shall be incurred by any person who may hereafter reserve or take more than eight per cent. per annum upon any contract, as contemplated in the first section of this act, any law, usage or custom to the contrary notwithstanding.

SECTION X.

ILLINOIS.

Act of April 2d, 1833.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time. *Provided*, that when the parties expressly agree upon an amount of interest, not exceeding the rate of twelve per cent. per annum, it shall be legal; any thing in this section to the contrary notwithstanding; and the several courts in this state are hereby required to give judgment accordingly.

SECT. 2. No person or corporation shall, directly or indirectly, accept or receive in money, goods, discounts, or things in action, or in any other way, any greater sum or greater value for the loan, forbearance or discount of any money, goods, or things in action, than as above described.

SECT. 3. Whenever, in any action brought on any contract or assurance, for the payment of money, or any other thing, it shall appear to the court before which such action shall be tried, by the pleading on the case, and on application of the defendant, that a greater rate of interest shall have been directly or indirectly reserved, discounted, or taken, than is allowed by this act, the defendant shall recover his full costs, and the plaintiff shall forfeit three-fold the amount of the whole interest reserved, discounted, or taken, and shall have judgment and execution for the balance only, which may remain due upon said contract or assurance, after deducting three-fold the amount of said interest, one-third part of which shall be paid to the defendant, and the remaining two-thirds shall be paid into the county treasury of the county in which such suit shall have been instituted.

SECT. 4. That if any person or corporation shall directly or indirectly contract to accept or receive in money, goods, discounts, or things in action, any greater sum or greater value for the loan, for-

bearance, or discount of any money, goods, or things in action, than is prescribed by this act, he, she, or they shall forfeit and pay to the person suing for the same, three-fold the amount of the whole interest so contracted, to be reserved, discounted or taken: *Provided*, said suit be not commenced by either of the contracting parties; and if so, then the amount so recovered shall be paid into the county treasury of the county where such suit shall have been instituted.

SECT. 5. Every person, who for any such loan, discount, or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives may recover in an action against the person who shall have taken or received the same, and his personal representatives, three-fold the amount of the money so paid, or value delivered above the rate aforesaid, either by an action of debt in any court having jurisdiction thereof, or by bill in chancery in the circuit court, which court is hereby authorized to try the same: *Provided*, said action shall be brought, or bill filed within two years from the time when the right thereto accrued.

SECT. 6. In the trial of any action wherein it shall appear by the pleadings that the fact of usury shall be put in issue, it shall be lawful for the debtor, the creditor being alive, to become a witness, and his testimony shall be received as evidence, and the creditor, if he shall offer his testimony, shall be received as a witness, together with any other legal evidence that may be introduced by either party.

SECT. 7. This act to take effect from and after the first day of April next.

Approved February 28th, 1833.

1. A defendant cannot avail himself of the statute against usury, unless the same be pleaded, and an application be made to the court where the cause is pending for the benefit of the act. *Murray* v. *Crocker*, 1 *Scammon R.* 212.

2. It is a well settled principle that the *bona fide* purchase of a note in a fair course of trade, at a greater discount than the rate of interest allowed by law, is not usurious when the original consideration was not tainted with usury. *Raplee* v. *Morgan*, 2 *Scammon*, 562.

SECTION XI.

INDIANA.

The act of 1831 authorized any rate of interest to be taken, provided the agreement for it was in writing, and signed by the party to be charged. *Revised Code of* 1831, *page* 290.

Present Statute of Indiana, 1838.

SECT. 1. *Be it enacted by the General Assembly of the State of Indiana*, That creditors shall be allowed to receive interest at the rate of six per centum per annum, for all moneys after they become due, on bond, bill, promissory note, or other instrument of writing; on any judgment recovered in any court of law, now or hereafter to be established in this state, or on any order or decree of a court of chancery or probate, for the payment of a specific sum of money, from the day of signing such judgment, order, or decree until effects be sold or satisfaction be made; likewise on money lent, on money for the forbearance of payment whereof an express promise has been made for the payment of interest; on money due on the settlement of accounts, from the day of liquidating the accounts between the parties, and ascertaining the balance; on money received to the use of another, and retained without the owner's knowledge, or retained after demand of payment; and on money withheld by any unreasonable or vexatious delay of payment.

SECT. 2. That no person or persons, body politic or corporate, shall on any contract, hereafter made, directly or indirectly, take or receive for the loan or use, or forbearance of money, or on any contract for the payment of money, above the rate or value of six dollars for the loan, use, or forbearance, or on the contract for the payment of one hundred dollars for one year, and so proportionably for any greater or less sum, and for any longer or shorter time; unless the stipulation to pay a higher rate of interest be made in writing and signed by the party to be charged. But in no case whatever, shall any person or persons, body politic or corporate, take or receive more than ten dollars for any such loan, use, or forbearance of money, or on any such contract for the payment of one hundred dollars for one year, and so proportionably for any longer or shorter time, or for any greater or less sum.

SECT. 3. If any person, either directly or indirectly, shall demand or receive any greater rate of interest than may be lawful for the use

of any sum of money, the person so offending shall, on conviction by indictment in the proper circuit court, pay a fine to the state of Indiana, for the use of the county treasury of the county in which the offence shall be committed, double the amount of the excess of interest so received above the amount by law allowed.

1. A debtor, in pursuance of a corrupt agreement to get time, gave his creditor an obligation, payable at a future period, for a sum including the debt and usurious interest at eight per cent. per annum from the time the debt accrued until the obligation was to be paid. *Held*, that the contract being usurious, the original debt without interest was all that could be moved. *Held, also*, that a plea setting forth the usury, and also a payment of part of the principal, was not bad for duplicity. 1 *Blackford*, 366.

2. The defendant, in an action on a usurious contract, not being able to prove the usury, had judgment against him. He afterwards filed a bill in chancery for discovery and relief. *Held*, that the bill in such case, must show the principal and lawful interest to have been paid or tendered; and in the case of a tender, the money must be brought into court.

A usurious contract is not void by the statute of this state; no interest can be recovered, but the principal may. *Crawford et al.* v. *Harvey*, 1 *Blackford*, 382. *See Roberts* v. *Gaff*, 4 *Barn. & Ald.* 92.

3. The payee of a note, who has sued the makers, cannot demur to a bill in chancery filed by the latter, because it charges the note to be usurious, and prays a discovery, if the complainants have brought the principal and legal interest into court. *Harvey* v. *Crawford*, 2 *Blackford* 43.

4. To an action of debt on a promissory note, for the payment of $150 at a future time, the defendant pleaded as to $50 of the amount, that the consideration of the note was a previous debt of $100, and a promise to delay its collection, and was, therefore, as to $50, usurious. *Held*, that the promise for forbearance, as shown by the plea, being in writing, and signed by the defendant, was valid under the statute of 1831. *Taylor* v. *Mick*, 4 *Blackford*, 388.

SECTION XII.

KENTUCKY.

An act to alter and amend the law concerning usury. Approved February 6th, 1819.

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That no person shall hereafter, upon any contract, take, directly or indirectly, for loan of any money, wares, and merchandize, or other commodity, above the value of six pounds for the forbearance of one hundred pounds for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time. All bonds, contracts, covenants, conveyances, or assurances, hereafter to be made, for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void, so far as relates to usurious interest; but the amount so loaned, with lawful interest thereon, he, she, or they shall be entitled to recover: *Provided, nevertheless*, that if the lender shall refuse to receive the principal, with lawful interest, on a tender thereof previous to the institution of suit for recovery, he, she, or they so refusing shall pay the costs of said suit; but in no case, either at common law or in chancery, or in any other way, shall the lender be prevented from recovering the debt, with lawful interest thereon.

SECT. 2. All acts or parts of acts coming within the purview of this act, shall be, and the same are hereby repealed. *Provided*, that nothing in this act contained shall be so construed as to affect any contracts heretofore made.

1. If one lend money and take a mortgage upon a negro as security, and contract to have, for the interest of the money, the *use* of the negro, which greatly exceeds the legal interest, the contract is usurious. *Richardson's Adm'rs* v. *Brown*, 3 *Bibb*, 207.

2. But if the agreement to set off the hire of the negro against the use of the money were subsequent to the contract of loan, the original contract will not be affected with the usury, but the latter agreement only. *Read* v. *Lansdale*, 6 *Hardin*.

3. A contract, to be usurious, must substantially be a lending and borrowing. If so, no shift or contrivance will enable the parties to evade the law. But if the contract be really not for borrowing and lending, it cannot be brought within the statute. If the contract for

illegal interest be for forbearing, and not upon the loaning of money, it is still usury within the meaning of all the statutes, from that of Anne to that of 1819. 5 *Little R.* 88.

4. In a contract for the purchase of property, the parties may stipulate for the damages to be paid in case of failure, and the court and jury will be bound by these damages thus ascertained, though they exceed the legal interest on the value of the property which ought to have been delivered. *Tardeveau* v. *Smith*, *Hardin*, 175.

5. A covenant to pay $150, in negroes, in six months, for the sum of $100, is usurious. 1 *Bibb*, 333.

6. T, having a replevin bond on K, received several sums of money for forbearance, from time to time, greatly exceeding the legal rate of interest; and then assigned the bond; the assignee and T were made parties to a bill for relief. The assignee being a *bona fide* purchaser, without notice of the usury, and being induced to purchase the bond by the express promise of K to pay, is entitled to have the amount on the replevin bond. But against T the complainant is entitled to relief and decree for the amount paid on the usurious dealing. *Kenry* v. *Talbot*, 4 *Bibb*, 39.

7. An evasive answer on the subject of usury, shall be taken as an admission of the usury. 4 *Bibb*, 319. 7 *Monroe*, 382.

8. An answer that does not meet the charge of usury directly, is liable to be assailed by weak proof. *Pierce* v. *Hedrick*, 3 *Little*, 113.

9. It seems that where facts amounting to usury are charged in a bill to be within the knowledge of the defendant, and he "cannot recollect, &c.," they shall be taken as true. *Lawless* v. *Black*, 4 *Monroe*, 488.

10. The service unexplained in an answer is only another name for usury. The "large sum of money" and the "hay and corn," without specification of the amounts, evince a disposition to evade a direct and explicit answer, therefore are an admission in effect of the allegation of the bill. *Brackenbridge* v. *Churchill*, 3 *J. J. Marsh.* 11.

11. An obligation void in its origin on account of usury cannot be made valid by any subsequent transaction between the parties. *Saller* v. *Duman*, 7 *Monroe*, 382.

12. H loaned $250 to M, to be paid in one year; H to have instead of interest the use of a negro, whose hire greatly exceeded the interest, took from M an absolute bill of sale of the negro; but gave M a writing, specifying that if he returned the money in one year he might redeem the negro. H kept the negro several years. The contract was usurious. H shall account for the hire of the slave, to

be set off against the money loaned and interest. *McGennis* v. *Hart*, 4 *Bibb*, 327.

13. The Court of Chancery will not entertain a suit to give relief to the party, upon a usurious contract, who has been guilty of the usury; but if the other party bring the case into court, he must pay what is in conscience due. *Morrison* v. *Helm*, 4 *Bibb*, 460.

14. A contract for the purchase of a slave at half price, and at the same time lending the vendor another sum with condition, that if a larger sum than the purchase money and the loan with interest conjoined shall be received, the slave shall be restored, and the lent money considered as paid, is usurious. *Shanks* v. *Kennedy*, 1 *Marshall*, 65.

15. Where money is loaned, and a negro given (upon a conditional sale as it purported) to secure the repayment, the hire of the negro and the sum to be repaid greatly exceeding the legal rate of interest, it was surely usurious, and the party shall be relieved. *Knox* v. *Black*, 1 *Marshall*, 298.

16. There must be a lending and borrowing; but if, upon an application to borrow money, a contract for purchasing property at a low price is made, with the privilege of repurchase at a price enhanced beyond the legal interest, (the first purchaser incurring no real hazard,) it will be considered a device to evade the statute of usury. *Heytle* v. *Logan*, 1 *Marshall*, 529.

17. A sale of a bond at a discount greater than the legal rate of interest, does not come within the law against usury. *Marchaud* v. *Prather et al.* 1 *Marsh.* 544.

18. If a bond be given to a creditor of the usurer, who is not privy to the usury, it will be good. *Chibs* v. *Coleman*, 2 *Marsh.* 300.

19. Compound interest is not forbidden by the statute against usury, but is held to be iniquitous and oppressive, and the chancellor will not enforce an agreement securing it. *Brackenbridge* v. *Brooks*, 2 *Marsh.* 174: *cited* 2 *Salked*, 449; 2 *Atkins*, 330.

20. Upon demurrer to a declaration upon a note for so much money and interest, and a premium of eight per cent., the court cannot pronounce it usurious; if so, it must be shown by plea. *Surlott* v. *Pratt*, 3 *Marsh.* 174.

21. On or before the 10th of May next, I promise to pay John V. Bush, One Hundred and Fifty round Silver Dollars, for value received this 19th day of March 1817. *Will. T. Bush.*

Test. Will. T. Christie.

I will pay fifteen per cent. on the above note until paid.

Will. T. Bush.

The defendant craved oyer and demurred. *Held*, that the question of borrowing or lending, or a promise to pay extraordinary interest for the sake of forbearance, is that on which the question of usury rests, and there is nothing on the face of the writing that proves that fifteen per cent. was promised in consideration of forbearance, or for some other consideration, and if it was based on any other legal consideration, the stipulation was valid. It was, therefore, by plea of fact alone, that the defendant could avail himself of the usury. *Bush* v. *Bush*, 7 *Monroe*, 53.

22. On or before the 1st day of March, 1820, we, or either of us, promise to pay Benjamin Logan the full sum of $143, with interest at the rate of twelve per cent. from the date, witness our hands, &c. Judgment was rendered by default for the $143, and twelve per cent. interest. The bond, in this case, shows on its face, that more than six per cent. interest was reserved for the forbearance of the principal. That which appears need not be pleaded or averred. The court should have given judgment for the principal, and six per cent. only by the act of 1819. *Dysut* v. *Logan*, 2 *J. J. Marsh.* 428.

23. To have relief on the ground of usury, the fact of *usury* must be so charged in the bill, and to make it out in evidence only, will not do. *Brown* v. *Heard*, 3 *Marsh.* 391.

24. Though the facts stated amount to usury, yet it must be charged. *Noland* v. *Johnson*, 1 *J. J. Marsh.* 10–11.

25. If the facts which constitute usury are set forth, it is not necessary to charge them as usurious, the legal conclusion will be made by the court. *Rhodes* v. *Bush*, 5 *Monroe*, 467. 6 *Monroe*, 81. 7 *Monroe*, 263.

26. If the original contract was usurious, although the stipulations which are reduced to writing may be fair, yet they are void, the *contract* being unlawful, and parol evidence shall be admitted to show that the contract therein varied from the writing. *Lear* v. *Yarnel*, 3 *Marsh.* 419.

27. Where the principal failed, and his sureties obtained indulgence from his creditor, by agreeing to pay ten per cent. per annum, which they did, and then took the note of their principal for repayment, including the ten per cent. paid by them, this last note was held to be usurious. *Martin et al.* v. *Legrand*, 2 *Little*, 327.

28. The party may make his defence at law, or omit to do so, and come into the court of chancery, either to enjoin the judgment or recover the amount paid usuriously on the judgment; 4 *Monroe*, 488;

5 *Monroe*, 394, 470; but he cannot avail himself of both jurisdictions. If he make his defence at law, he must abide by it. The court of chancery will not compel a discovery to aid the defence in a court of law; for the chancellor compels him to pay the principal, which would be lost in the court of law. (See the statute of Feb. 1819, by which the contra.)

29. The sale of notes for less than their nominal amount, is not usurious; unless that mode of dealing is resorted to as a stratagem to evade the force of the acts against usury. *Fitzgerald* v. *Park*, 4 *Little R.* 126.

30. Where an injunction had been perpetuated against a judgment recovered by an assignee of a note, and the assignor thereupon gave his obligation to pay the amount and ten per cent. thereon, the contract was not deemed usurious; because if the injunction had been dissolved, the law would have given ten per cent. to the assignee. 4 *Little R.* 126.

31. That the note was given upon usurious consideration, of which the assignee had full knowledge, is no defence in an action by the assignee against the assignor, after having duly prosecuted the payor; for the assignment is a separate contract from the note. *Owings* v. *Grimes*, 5 *Little R.* 331.

32. But if a note were made and assigned for the purpose of securing an usurious loan, there could not have been a recovery against the assignor. *Maeley* v. *Armstrong*, 3 *Monroe*, 289.

33. The agreement of the party to abandon all claim for usury, in the setting off the hire of a slave against the interest of money, for the purpose of obtaining the possession of the slave again, is nought. 1 *Monroe*, 119.

34. To a *scire facias* on a judgment obtained upon a usurious contract, the party will not be permitted to plead the usury in avoidance of the judgment. *Lawrence* v. *Saunders*, 1 *Monroe*, 266.

35. But a note executed for the judgment upon such usurious contract is void, and the usury may be pleaded, notwithstanding a judgment was rendered for the demand. 1 *Monroe*, 266.

36. Where usury has been sufficiently pleaded in an action at law, and in demurrer the plea adjudged bad, and judgment rendered, the matter cannot be set up again in equity. The defendant at law should have taken the case to the court of revisal. *Lawrence* v. *Saunders*, 1 *Monroe*, 269.

37. If the original contract were usurious, however, the contract

might be divided into different securities, some written, some verbal, still the whole would be void. 5 *Monroe*, 395.

38. But an usurious transaction may be cleansed of the usury, and a new contract can be made free from usury, which will be legal and valid, as where the usurious interest is paid up, and upon a renewal of the security the party refuses to take more than legal interest. 3 *Mon.* 347. 1 *J. J. Marsh.* 276. 10 *Wheaton*, 367. 3 *J. J. Marsh.* 683.

39. Where an unsuccessful defence of usury is made before a justice of the peace, and on an appeal taken to the circuit court, which is dismissed for some fault in the justice or the clerk, the party may still have relief in the court of chancery; and this is a just exception to the rule, that where a party makes a defence in one court, he shall not apply to the other. 5 *Monroe*, 394.

40. B obtained of R $1057, and assigned him good promissory notes for $1800, and took his obligation for those to be returned on condition that B paid him $1216 within twelve months, otherwise not: *Held*, a clear case of usury. *Rhodes* v. *Bush*, 5 *Monroe*, 469.

41. The limitation of five years in favor of the usurer, runs from the time the usurious interest is paid. *Ibid.*

42. Whatever difficulties may exist against the introduction of parol evidence, to reduce an absolute deed to a mortgage, none can arise where usury is alleged and proved. It is the effect of the statutes against usury, to admit such evidence to vary or alter the terms of a written instrument, and to expunge from it all that is usurious. Mingling usury with the sound part of a contract, always presents a sufficient apology for the introduction of parol evidence to overthrow, vary and contradict any written document, however solemn and formal, introduced as evidence of the contract. *Fenwick* v. *Ratcliff*, 6 *Monroe*, 155, 553. 7 *Monroe*, 253. 3 *Coke R.* 80. 5 *Coke*, 69. *Cro. Jac.* 252.

43. An obligation to pay S C $300 one day after date with legal interest from the date; I also agree to let said S C have the field of mine she now occupies, until $100 of the above money is paid. The rent was worth more than the legal interest. This was a device to cover usury. *Wholly* v. *Crutregner*, 6 *Monroe*, 158.

44. If a depreciated medium is loaned, and the loan is to be paid in a medium more valuable than the increase of the legal rate of interest, then a greater rate of interest is reserved than the law permits, especially if there be a lending and borrowing; and the matter generally rests on the inquiry, whether the transaction is a loan.

Usury may be by the reservation of interest, as rent on a lease made by the lessor, so intending to get interest to the lessee, at an unreasonable rent, or by obtaining a beneficial lease at an inadequate rent. *Beels* v. *Saunderson*, *Cro. Jac.* 44. *Shep. Touch.* 62. *Drew* v. *Power*, 1 *Scho. & Le Fr.* 182. *Brown* v. *Odea*, 1 *Scho. & Le Fr.* 115.

45. Every shift, device or subterfuge, which the ingenuity of man can invent to take unlawful interest, either directly or indirectly, or by any shift, or deceitful way or mean, is included in the provision of the statute. Neither are cases of usury confined to precise loans of money; but they extend to cases where the relation of debtor and creditor exist; and to cases, wares, merchandize or commodities. 1 *Scho. & Le Fr.* 191—2. Exorbitance of price imposed upon a person obtaining a loan or forbearance, are always liable to suspicion, and give a contract the appearance of usury. No one has a right to take advantage of the embarrassments or distress of another, to impose upon him exorbitant terms for a loan or forbearance. In *Lawley* v. *Hooper*, 3 *Atkins*, 379, Lord Hardwick said there has been a long struggle between the equity of this court and persons who have made it their endeavor to find out schemes to get exorbitant interest, and to evade the statutes of usury. The court very wisely hath never laid down any general rule beyond which it would not go, lest other means of avoiding the equity of the court should be found out. Therefore they always determine upon the particular circumstances of each case, and wherever they have the least tincture of fraud in any of these oppressive bargains, relief hath always been given. *Grimes* v. *Schreeve*, 6 *Monroe*, 553, 554.

46. An advance of money to an applicant for a loan, and his obligation taken to deliver slaves of a certain description in a certain time worth more than the money and legal interest, held to be usurious. *Lindsley* v. *Sharp*, 7 *Monroe*, 248.

47. The device of a conditional sale of property to cover the appearance of the usury detected. *Butts* v. *Bondurant*, 7 *Marsh.* 423.

48. Where the usurer has renewed his securities since the passage of the act of 1819, he is entitled to recover the principal and legal interest. In making up the account between the parties, where there has been many notes and repeated borrowings, it will be necessary that the simple amount loaned at each time shall be ascertained, and this ought to be the amount of each note, excluding therefrom interest, legal or illegal. On this sum so loaned, simple interest is to be calculated, disregarding all renewals and consolidations, till the time

the calculation is made, and then applying the payment when made, first to the interest due, and then the balance to the principal, and the sum thus found due from either party, ought to be the amount of the decree. According to this mode, all payments for usury or interest must be credited as payments when made. *Kay* v. *Fowler*, 7 *Monroe*, 596.

49. Depreciated bank paper, like stocks or other commodities, is a fit subject for contract of sale or barter. It may be sold or exchanged for money or property without any imputation of usury. If one individual, believing that Kentucky bank paper would be equal to specie in one year, should purchase it for his own promissory note to the full nominal amount in specie, on a credit of two years, we cannot imagine why he may not do so; nor can we perceive why the circumstance of giving his own note, instead of any other thing in exchange for the bank notes, would taint the contract with usury. It might be a slight circumstance tending to strengthen others conducing to prove usury. But the contract could not be considered *per se* an usurious one. But where there is a contract of borrowing and lending the matter is different, or a sale of paper to an applicant for a loan. The reservation of interest in a separate note, is a strong indication of a loan, and unexplained should be conclusive. *Boswells* v. *Clarkson*, 1 *J. J. Mar.* 49, 50, *cited* 1 *Jon. ch.* 193. *Dey* v. *Dunham*, 2 *Jon. ch.* 537. *For bad plea, see* 1 *J. J. Marsh.* 278.

50. If the *whole* consideration were usury, the note, even according to the act of 1819, is *void*. It was not necessary to aver the amount of the loan nor its date. *Lollard* v. *Field*, 1 *J. J. Marsh.* 284.

51. K loaned to the plaintiff $37 50 in specie, (when the paper of the bank of the commonwealth was at a depreciation of *two for one*,) for which the plaintiff executed his note for $90 in commonwealth paper, payable in one year after the date. This is not usurious. The lender risked the prospective value of the paper. This value was variable and contingent. It was the subject of speculation. Where there is hazard that the lender may have less than his principal, it is no usury. *Wilson* v. *Kilburn*, 1 *J. J. Marsh.* 596.

52. M purchased two notes which S executed to B, who sold them at a considerable discount. The object of S and B was to raise money on the notes for the use of S. M was not informed of this when he bought the notes. M did not lend money, he purchased choses in action made assignable by statute, and constituting an ar-

ticle of traffic; there is no usury in the matter. *Shackelford* v. *Morris*, 1 *J. J. Marsh.* 497.

53. The defendant pleaded to an action on a note, given to the Bank of Kentucky, that the note was given for its nominal amount in depreciated paper, and that he had paid the bank an amount equal to the specie value of the paper. Betwixt individuals, the value of the paper and six per cent. interest upon that value, is the utmost that the law will enforce a borrower of such paper to pay; more is usurious. But the act of 1820 provides, *that the consideration of a note given to the Bank of Kentucky, shall not be questioned in any suit brought upon the same, to evade the payment thereof.* This provision includes such a plea as this. *Harrison* v. *Bank of Kentucky*, 2 *J. J. Marsh.* 140.

54. Taking in a note given upon a usurious contract, and executing another in lieu thereof to a creditor of the usurer, gives the obligor an instantaneous right of action to recover the usury; and the statute of limitations will commence to run. *Brakenbridge* v. *Churchill*, 3 *J. J. Marsh.* 16.

55. Depreciated bank paper is a commodity liable to be bought and sold like any other article. A lending and borrowing must be established before there can be usury. A device to avoid the statute is, in reality, but a lending and borrowing. The court cannot, from the solitary fact that a note was given payable in specie in twelve months, for the same amount of depreciated paper, conclude that there was usury. *Talbot* v. *Warfield*, 3 *J. J Marsh.* 84.

56. The receiving of interest is evidence that the transaction was a loan. *Morris* v. *Caldwell*, 3 *J. J. Marsh.* 694.

57. Note payable in dollars for nominal amount of loan in Commonwealth's Bank notes, is usurious. *Fleming* v. *Thomas*, 4 *J. J. Marsh.* 48.

58. In original transaction usurious, the contamination extends to all subsequent transactions embracing and continuing the first. *McCampbell* v. *Gill*, 4 *J. J. Marsh.* 89.

59. Usury paid may be recovered by bill in chancery. *Ibid.*

60. Although the holder of a note which contains usury has received as much Commonwealth's Bank paper in discharge of it as amounts nominally to the entire sum called for by the note, yet he has received no usury; unless the Commonwealth's Bank paper accepted by him in discharge of the note, amounts, in real value, to more than what was legally due. *Holmes* v. *Jesse*, 5 *J. J. Marsh.* 431.

61. A executes his note to B for $1000, containing $200 usury. A pays B $1000 in Commonwealth's Bank paper when at a depreciation of fifty per cent., and thereupon B surrenders the note to A; in such case, A cannot recover of B the $200 of usury which the note contained. *Ibid.*

62. If A loan B $100, take his note for $200, and afterwards accept $100 (or its equivalent, $200 in Commonwealth's paper) in discharge of the note, he has no longer any just or legal claim on B, nor in such case can B complain of usurious exactions. *Ibid.*

63. On contract to pay Commonwealth's paper and interest thereon, it is not usury to exact Commonwealth's paper and interest, notwithstanding the paper has appreciated since the date of the contract. *Turpin* v. *Turpin*, 7 *J. J. Marsh.* 37.

64. Obligee assigns a note, informing assignee that it is bearing an interest at twelve per cent., and promises that if the obligor did not agree, when assignee should see him, to pay twelve per cent., he, obligee, would pay it. Decided, that obligor had not induced assignee to purchase the note. He would be relieved from the payment of the usury. *Denham* v. *Stone*, 7 *J. J. Marsh.* 176.

65. Previous to the passage of the statute of 1819, A executed a note and B endorsed it, with a view to obtain for A the loan of a sum of money from C, and C loaned the money to A at an usurious rate of interest on the faith of the note. Decided, that it appearing that the transaction was an usurious loan of money by C, the note was *void*, and A and B absolved from all liability to C for the money loaned by him to A. *Outen* v. *Graves*, 7 *J. J. Marsh.* 630.

66. Where one party delivers to another depreciated bank notes, and takes an obligation for their nominal amount, payable in specie at a future day with interest, the transaction, nothing else appearing, must be taken to be a usurious lending. Relief granted from the judgment to the amount of the usury. *Warfield* v. *Boswell*, 2 *Dana*, 225.

67. Where, upon an application for a loan of money, a party advances it upon property of much greater value, being sold and delivered to him, the vendor reserving the right to repurchase by refunding the money with interest in a given time; the transaction is treated by the courts as a loan upon security, and a mere device to evade the statute of usury. *Perkins* v. *Dye*, 3 *Dana*, 173.

68. A judgment is recovered against a principal and surety. Upon an agreement then, the surety signs the replevin bond, and the principal gives him a note which includes the full amount of the replevin

bond, *with about thirty per cent. added to it,* and the surety agrees in writing to credit the note with the same amount, provided the principal pays the replevin bond himself. They agree in the pleadings that the arrangement was intended not merely to have the effect of a penal bond, but as an indemnity to the surety, in case the payment of the replevin bond should devolve on him. *Held,* that this contract is but an agreement for a loan of money in a certain contingency at a future day, upon an agreement that more than six per cent. should be paid for the loan, and is usurious. The surety may enforce a judgment he has on the note, to the amount actually paid by him in discharge of the replevin bond, with legal interest from the time when he paid it. From the balance, the principal is relieved in equity. *Moore's Ex'rs* v. *Vance,* 3 *Dana,* 362.

69. The laws of the several states relating to interest and usury, vary essentially; and whether a note payable in another state on a contract there made, is infected with usury or not, depends upon the local laws of that state, which are not judicially known to the courts here, but are facts to be averred and proved like other facts; and without such proof, no court here can decide that such a contract is usurious. *Greenwade* v. *Greenwade,* 3 *Dana,* 497.

70. Usurious interest having been paid by a principal debtor, a surety seeking to be relieved of the whole debt on other grounds, is relieved from so much as the excess above the lawful interest, applied as a payment when it is exacted, will extinguish. *Bartlow* v. *Bonde,* 3 *Dana,* 595.

71. Usury in the contract between an assignor and assignee, upon which a note was assigned, does not affect the note itself, and cannot be taken advantage of by a third party to gain a precedence for his own debt in the application of the trust estate conveyed to secure both debts. The laws against usury are made to protect those only upon whom it is practised; and a stranger to a contract can take no advantage of the usury with which it is affected against the will of the party who submits to it. *Campbell* v. *Johnson,* 4 *Dana,* 181.

72. The surety in replevin bond may with or without the assent of the principal, insist that credit shall be given on the bond for usury exacted of the principal for forbearing to collect the bond. *Crucher* v. *Trabore,* 5 *Dana,* 81.

73. When a debtor pays money to his creditor for usurious interest upon the debt, equity will neither permit that application of it, nor permit the debtor to recover it, while the debt and legal interest remain unpaid, but will consider it as money received by the creditor

for the use of the debtor, (though such was not the intention of the parties) and which ought then to have extinguished thus much of the debt; and when the debtor or his surety insist that it shall be so applied, the statute of limitations is no answer to the demand. *Ibid.*

74. Any deed or other writing, however absolute upon its face, if given in fact to secure an usurious loan, may be impeached by parol proof. *Stasop* v. *Phelps*, 7 *Dana*, 300.

75. A party hired two slaves at $150 for a year, and afterwards obtained a bill of sale of them to secure a debt of the owner, which had been assigned to him; when the year was half out, having to provide for another debt which he owed, the assignor obtained $200 of the hirer, $100 by giving up the note for $150, and $100 for the hire for another year. *Held*, that this must be deemed one of many usurious transactions that occurred between the parties; and upon the redemption of the slaves, the hirer must account for their hire at a reasonable rate, credited by the payments made. *Woodward* v. *Fitzpatrick*, 9 *Dana*, 121.

76. Where a party was offered a note in payment, part of which was for usury, and was assured *by the maker* that it should be paid in full, and then received by assignment, and afterwards gave it up, and took a new note of the same obligor with security for the amount, thereby relieving his assignor: *Held*, that neither the obligor nor his surety can be relieved against the payment of the usury; their remedy is against the party with whom they contracted to pay it, and who has virtually received it. From the payment of some usury in the last note, for forbearance since the assignment of the first, relief is granted. *Goodloe* v. *Ross*, 9 *Dana*, 593.

SECTION XIII.

LOUISIANA.

Civil Law, Chap. 3.

Art. 2894. It is lawful to stipulate interest for a simple loan, whether of money or other movable things.

Art. 2895. Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit: at five per cent. on all sums which are the object of judicial demand, whence this is called judicial interest; and on sums discounted by banks, at the rate established by their charters. The amount of the conventional interest cannot ex-

ceed ten per cent. The same must be fixed in writing; and testimonial proof of it is not admitted in any case.

Art. 2896. The release of the principal without any reserve as to interest, raises the presumption, that it also has been paid, and operates of release of it.

1. By the laws of Spain, conventional interest was allowable; and in order that the contract should be usurious, it must be shown that the convention was for a rate of interest greater than the usual rate.

2. And where contract was usurious, plaintiff might recover principal and such interest as was legal, he only forfeited such part of the interest as exceeded the rate allowed by law. *Caisergues* v. *Dugarreau*, 1 *Martin R.* 11.

3. If usurious interest has been paid, the defendant may, under the plea of payment, demand the deduction from the principal due, of the differerence between the legal interest of five per cent. and the usurious interest paid. *Dunnford* v. *Baritau*, 5 *M. R.* 504.

4. If by written agreement usurious interest is contracted to be paid, the lender cannot recover the highest rate of conventional interest, but only the legal interest. *Ibid*, 506.

5. A stipulation, that if a note be not paid at maturity, it shall bear interest at the rate of ten per cent. from its date, is not usurious. *Lauderdale* v. *Gardner*, 8 *M. R.* 716.

6. Contracts in which there is usury, are, by the Spanish law, null as to all intetest, but the lender may recover back the money loaned. *Byrd* v. *Bowie*, 5 *N. S.* 202. *Hernan* v. *Sprig*, 3 *N. S.* 190

7. Usury may be committed by agreeing to take the legal rate of interest on a larger sum than that *really due.* *Ford* v. *Shamburgh*, 3 *N. S.* 622.

8. If the services of a slave, given for the use of money, exceed in value the highest rate of conventional interest, the contract is usurious. *Galloway* v. *Logan*, 4 *N. S.* 167.

9. A contract by which a borrower agreed to pay interest to lender on bank stock, received by him at a certain price when the stock was worth less in the market, is usurious. *Astor* v. *Price et al.* 7 *New Series*, 409.

10. If a note bearing interest be given for a debt due, the creditor may waive proceeding or claiming under the note, and recover on the previous debt. *Depau* v. *Humphreys*, 8 *N. S.* 2, *or* 20 *Martin.*

11. A transaction entered into in New York, and to be executed

there, by which A and B exchange their notes, bearing interest at six per cent., and in consideration thereof, B engages to insure a certain number of lives with A, at the usual rates, and also send his annual crop of sugar to A, to be sold on the usual commissions, is usurious and void by the laws of New York. *Clague et al.* v. *their Creditors*, 2 *Lou. R.* 115.

12. An injury from usury is not a *quasi offence*, and a suit for it is not barred by one year. *Perrulleat* v. *Pench*, 2 *L. R.* 429.

13. A contract to pay usurious interest is a natural obligation, and money paid under it cannot be recovered. *Ibid*, 431.

14. A contract by which ten per centum interest is taken for money, and two and a half per cent. commissions for advancing it, is usurious, and the lender can consequently only recover the principal. *Daquin et al.* v. *Cairon*, 3 *L. R.* 393.

15. In all questions touching usury, the inquiry is this: "Were the advantages or remuneration stipulated for in consideration of the loan of money, and if so, are they greater than the rate of interest allowed by law?" *Ibid*, 409.

16. But if the original contract be for a legal rate, and this be afterwards extended to an illegal rate, the second contract being null does not avoid the first, which remains good. *Ibid*, 409.

17. Defendant being sued on a mortgage for a certain sum with interest, may plead, that in addition to the interest, the plaintiff had received the services of the slave mortgaged, so that the contract was usurious, and may demand in compensation the value of the services as an offset both against principal and interest. *Kains* v. *Kemp*, 4 *Lou. R.* 319.

18. Where plaintiff having funds of defendant in hand, charged him in account with interest, and credited him with the funds, so as to leave a small balance which was afterwards settled. *Held*, that the defendant having made no objection at the time, nor for several years afterwards, could not object to the account as charging usurious interest, for his assenting to the account was a payment of such interest. *Millaudon* v. *Arnaud*, 4 *L. R.* 544.

19. The laws of Spain, affixing a penalty for taking a higher interest than that allowed by law, are repealed. *Ibid.* 545.

20. Usury may be shown and taken advantage of, even when it is not pleaded, if it appears from the petition or evidence offered by the plaintiff that more than ten per cent. was stipulated. *Flower et al.* v. *O'Conner*, 7 *Lou. R.* 208.

21. Usury necessarily involves a loan or forbearance of payment,

money given for the loan of money. An obligation to be tainted with usury, must in its inception be based upon a loan of money above the legal rate of interest. The sale and giving in payment of a note at a greater discount than the interest allowed by law, is not usurious or illegal, as between the holder and endorsers, when it is transferred by delivery without endorsement. *Norwood* v. *Waddel*, 11 *L. R.* 493.

21. In the absence of legal proof of a foreign law concerning interest, the court will be governed by the law of Louisiana in allowing interest. *Mason* v. *Mason*, 12 *L. R.* 594.

22. There is no usury in the sale of a note, although more than the highest rate of conventional interest was deducted, if the vendor does not endorse it, or is not a party to it. It is of the essence of a contract of loan, that he who receives money is bound to return it, and to which alone usury attaches. *Nott* v. *Passett*, 15 *L. R.* 306.

23. Where there is no evidence of the rate of interest, in the state where the obligation sued on was made, it must be assumed as the same rate of legal interest in this state. *Patterson* v. *Yorrison*, 16 *L. R.* 557.

24. A third purchaser of an estate subject to certain mortgages, which she assumes to pay, cannot set up her claims in opposition to the mortgage creditor on said estate. A person contracting to pay the debt of another, and receiving property out of which it was to be paid, cannot oppose the plea of usury or go into the consideration of that debt, and retain the means placed in his hands to pay it. Usurious interest which has been paid cannot be recovered back. *Kenner & Co.* v. *Halliday et al.*, 19 *L. R.* 155.

25. Where A gave his own note to B for $11,000, payable in two years, and received in payment the note of a third person, endorsed by B, for $10,000, payable ten days after his own: *Held*, that it was an agreement to give and receive usurious interest, and null.

An agreement to take even a legal rate of interest on a larger sum than is *really due*, is usurious. So a contract to make cash advances, and to receive ten per cent. interest thereon, and be entitled to one-third of the profits of the firm to which the advance was to be made, was held to be usurious. Accounts which have not been objected to and received by the party, although they contain extravagant charges for commissions and usurious interest, will not be re-opened in a suit for a final settlement, and to recover a balance. Usurious interest once paid cannot be recovered back. *Flower* v. *Millaudon*, 19 *L. R.* 185.

SECTION XIV.

MAINE.

Revised Statutes of 1840, *page* 317, *title* 4, *chap.* 69.

SECTION 1. The legal rate of interest, upon the loan, or forbearance, of any money, goods, or merchandise, or things in action, shall continue to be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, and for a longer or shorter time.

SECT. 2. If any person, upon any contract, mortgage, or assurance, hereafter made, shall take, directly or indirectly, for loan of any moneys, wares, merchandise, or any other commodity, above the rate of interest mentioned in the preceding section, and if, upon any such contract, bond, mortgage, or assurance, whereupon, or whereby, there shall be reserved or taken above the rate of interest aforesaid, an action shall be commenced against the debtor, he may, on the general issue, avail himself of this act, and thereby avoid the excess over and above said legal rate of interest.

SECT. 3. In any such action, sued on any such bond, contract, mortgage, or assurance, wherein or whereby a sum is secured or given, for forbearance or giving day of payment, for any particular time, then, if the creditor be alive, and the debtor, or any one of them, where there are two or more, shall come into court, where the cause is pending, and shall actually swear that there is reserved, or secured, on such bond, mortgage or contract, or assurance, above the legal rate of interest, above mentioned, or that the creditor has received more than the legal rate of interest, above stated, for the forbearance of the money, or other things, lent or sold, all such excess, above legal interest, shall be void: and the debtor shall be discharged from the payment of it, unless the creditor, or one of them, if there be more than one, will swear that he has not, directly or indirectly, wittingly taken or received more than the legal rate of interest; and that by such bond, mortgage, contract, or assurance, there is not reserved more than such legal rate of interest.

SECT. 4. Nothing in this chapter shall extend to letting cattle, or other usages of the like nature, in practice among farmers, or maritime contracts among merchants, as bottomry, insurance, or course of exchange, as has been heretofore practised.

SECT. 5. Whoever, on any such loan, shall in any manner pay a

greater sum or value than is by law allowed to the creditor, may, or his personal representatives may, recover of the creditor, or his representatives, by action at law, the excess, so received by such creditor, whether in money or other property.

SECT. 6. The preceding section shall not extend to bills of exchange, or promissory notes, payable to order or bearer, in the hands of an endorsee or holder, who shall have received the same in good faith, and for a valuable consideration, and who had not, at the time of discounting such note or bill, or paying such consideration, actual notice, that the same had been given for an usurious consideration, or upon an usurious contract.

SECT. 7. In a suit brought where more than legal interest shall be reserved or taken, the party, so reserving and taking, shall recover no costs, but shall pay costs to the defendant; provided the damages shall be reduced by the oath of any one of the defendants, where there are more than one, by reason of such usurious interest.

SECT. 8. The action, mentioned in the fifth section of this chapter, must be commenced within one year, next after the payment of the money or property therein mentioned, or the same will be barred.

1. If money be loaned on a usurious contract, and on maturity of the note it be partially paid, and a new note, similar to the former, be given for the balance, such new note is void for the usury. And if the borrower be not a party to the usurious note, being neither maker nor endorser, but the security is such, both as to parties and time of payment, as had been previously agreed between the borrower and lender; the endorser, in action against him, may show the usury in bar of the action. *Warren* v. *Crabtree*, 1 *Greenleaf*, 167.

2. The consideration of a recognizance or statute acknowledgment of debt, *it seems* may be impeached for usury, even in an action brought by the creditor against the debtor, for possession of the land taken by extent in satisfaction of the debt. *Chandler* v. *Morton*, 5 *Greenleaf*, 374.

3. The party giving a usurious security is in all cases entitled, at some time, to avoid it by showing the usury, unless he has waived the right by his own act, or forfeited by his own neglect. *Richardson* v. *Field*, 6 *Greenleaf*, 35.

4. Therefore, where a right in equity of redemption had been sold at sheriff's sale, and became absolute in the purchaser by the expiration of the year, and the purchaser took an assignment of the mortgage, thus uniting the whole title in himself, and then brought a writ

of entry against the mortgagor, who had always remained in possession; it was held, that the latter might set up the defence of usury in the notes to defeat the demandant's title. *Ibid.*

5. Where the title to real estate is absolutely valid by deed of bargain and sale, it shall not be disturbed by proof that all or part of the consideration was a usurious debt. *Hale* v. *Jewell*, 7 *Greenleaf*, 435.

6. Before the statute of 1834, ch. 122, to restrain the taking of excessive usury, all securities for the payment of money loaned on any usurious contract, wherein usurious interest was reserved or secured, were merely void, although no money was actually paid. And where money is loaned on such usurious contract, and the security in which it is reserved is avoided for that cause; the money actually loaned on such contract may be recovered on the money counts. The statute of 1834, ch. 122, applies only to contracts made after the act took effect. Where the original contract is usurious, any subsequent one, made to carry it into effect, and obtain the fruits of it, is also usurious and void. *Lowell* v. *Johnson*, 14 *Maine*, 240.

7. The sale of a negotiable note, free from usury when made, and available as a good note before the sale, at a greater discount than legal interest, is not usurious, although endorsed by the party making the sale; and on non-payment by the maker, the endorsee may maintain an action against the endorser. The sum which the endorsee is entitled to recover from the endorser, is the amount of the money paid for the note, with interest. *French* v. *Grindle*, 15 *Maine*, 163.

8. The sale of a negotiable note, free from usury when made, at a greater discount than legal interest, is not conclusive evidence of usury, although the party making the sale is unconditionally liable by his endorsement. *Fenner* v. *Sewall*, 16 *Maine*, 456.

SECTION XV.

MARYLAND.

Chap. 69. *An act against excessive usury.*

BE IT ENACTED, *by the Queen's most excellent Majesty, by and with the advice and consent of her Majesty's Governor, Council and Assembly of this province, and the authority of the same,* That no person or persons whatsoever, within this province, whether inhabitant or foreigner, upon any contract, from and after the end of this present session of assembly, shall exact or take, directly or indirectly, for loan of any monies, wares or merchandizes, or other commodities whatso-

ever to be paid in money, above the value of six pounds for the forbearance of one hundred pounds for one year, and so after that rate for a greater or lesser sum, or for a larger or shorter time, nor shall any person or persons whatsoever, within this province as aforesaid, from and after the time aforesaid, exact and take directly or indirectly, for loan of any tobacco, wares, merchandizes, or other commodities, for one year, to be paid in tobacco or other commodities of this province, above the value of eight pounds of tobacco for the forbearance of one hundred pounds of tobacco, and after that rate for a greater or lesser sum, or for a longer or shorter time.

II. And, That all bonds, contracts and assurances whatsoever, made after the time aforesaid for payment of any principal money or tobacco, goods or commodities aforesaid, to be lent or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved above the rate of six pounds in the hundred for money as aforesaid, or above eight pounds in the hundred for tobacco, or other goods and commodities as aforesaid, shall be utterly void.

III. And, That all and every person and persons whatsoever, which after the time aforesaid shall, upon any contract to be made, take, accept and receive, by ways or means of any corrupt bargain, loan, exchange, chievezance, shift, or interest of any wares, merchandizes, or other thing or things whatsoever, or by any deceitful ways or means, or by any covin, instrument, for deceitful conveyance, for the forbearance, or giving day of payment, for one whole year, of and for their money, tobacco, goods and commodities aforesaid, above the sum of money, or quantity of tobacco aforesaid, for the forbearance aforesaid, shall forfeit and lose for every such offence the treble value of the money, tobacco, wares, merchandizes, or other thing, so lent, bargained, sold, exchanged, and shifted as aforesaid, the one-half of the said fine and forfeiture to our sovereign lady the queen, her heirs, and successors, for the support of this government, the other half to him or them that shall sue for the same, to be recovered in any court of record in this province, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law to be allowed.

September, 1704.

1. A promissory note for $1,745, payable ninety days after date, made by B at the request of E, and for his accommodation, and by E taken to G, who endorsed it with E, and then delivered by G to M, who negotiated it with H for $1,648, which was paid to E, is void, for usury. *Saucrevein* v. *Brunner*, 1 *Harris & Gill*, 477.

2. Where a note commences in usury, or in other words, where a note is tainted with usury at its birth, when it first becomes legally efficient and operative, so as to give to the holder a right of action upon it, no subsequent holder for a valuable consideration, without notice of such usury, can maintain a suit upon it; such note being declared by statute null and void. A note endorsed for the accommodation of the maker, and passed by him as a security for a usurious loan, is a usurious contract in its inception, as the lender is in fact to be considered the first holder of the note. *Ibid.*

3. A loan at par of bank notes passing at from two to five per cent. discount, unexplained by circumstances, would be usurious; but where the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction would not be deemed usurious, unless the privilege was a mere cover to cloak a usurious design. *Catron* v. *Shaw & Tiffany*, 2 *Harris & Gill*, 13.

4. Upon a plea of usury to an action upon a single bill, it appeared that the bill had been given upon a settlement of an account, which contained items of debt and interest. In two of the items the interest as calculated exceeded six per cent. The receipt for the bill at the foot of the account stated that in case of error either way, should any be discovered, it should be corrected. *Held*, that this was no evidence of a usurious agreement. *Stackell* v. *Etheall*, 3 *Gill & Johnson*, 123.

5. Every case of usury must depend upon its own circumstances. It is the intention, and not the words used, that gives character to the transaction; and that intention when it can be reached must govern. Where the real truth and substance is ascertained to be a loan of money, a lending on one side and a borrowing on the other at a rate of interest exceeding six per centum., the form given to the transaction is not material; no shift or device can take it out of the act of assembly. *Ibid.*

6. Z being insolvent, and desirous to raise money, applied to F and obtained his promissory note for $250, payable sixty days after date to Z for the purpose of selling it to raise money. No consideration was paid for the note. Z endorsed the note in blank, sold and delivered it to the plaintiff, who was ignorant of its being a lent note, for the sum of $200. The maker of the note was in good circumstances. *Held*, that the note was usurious and void. *Cockey* v. *Forrest*, 3 *Gill & Johnson*, 482.

7. Usury is a question of fact for the determination of a jury. A note made and endorsed in execution of a previous usurious contract is void. *Thomas* v. *Cotheall*, 5 *Gill & Johnson*, 23.

8. Where all usurious contracts are declared by law to be null and void, there can be no recovery either at law or in equity in a suit instituted upon an instrument infected with usury, if the defence of usury be pleaded; the very instrument that is sought to be enforced, being null and void.

9. When a mortgage is given on a usurious consideration, the plea of usury either by the mortgagor or his alienee is a full defence to a bill for a foreclosure by the mortgagee. But there is a recognized distinction between that and the case of a mortgagor who goes into chancery seeking relief against the mortgage on the ground of usury, which will only be extended to him on his paying or offering to pay, the principal and legal interest of the sum due, and this on the principle that he who seeks equity to obtain relief, must do equity. *Trumboo, Ex'r of Niff* v. *Blizzard & Jacobs.*

In this case, both the defendants set up the usury in answer, and one pleaded in addition. 6 *Gill & Johnson*, 18.

10. Ejectment for land. Plea, general issue and joinder. Plaintiff produced and read in evidence, a deed from the defendant on the 19th April, 1794, whereby, for the consideration of £500, current money, the defendant conveyed to the lessor of the plaintiff the land in question. The defendant offered in evidence, that the lessor of plaintiff lent to the defendant the sum of £500, and that at the time of the loan it was agreed by parol between them, that lessor of plaintiff should receive, and defendant pay, at the rate of *nine per cent. per annum* on the money so loaned; and it was further agreed that the defendant should execute a deed as a further assurance, under which plaintiff claims title. The defendant further offered and read in evidence, a bond admitted to have been executed by the lessor of plaintiff to defendant on the 1st of May, 1794, stating the loan of the said sum of £500 on the 19th April, 1794, and the deed for the land from defendant to lessor of plaintiff, and that the defendant had agreed to pay unto lessor of plaintiff the said £500 in gold and silver, with legal interest thereon from the last mentioned day, on the 1st of October then next, and that if the money was then paid, the lessor of plaintiff should make over the land to the defendant; but if it was not then paid, the said bond should be void.

Plaintiff offered in evidence, that the sum of £500 was composed of £436, 5s. 4d. money lent, of £55, 10s. due at that time on bond from defendant to lessor of plaintiff, and which bond in consideration was given up; and of the further sum of £8, 4s. 8d. at and before that time due by account from defendant to lessor of plaintiff, for

work and labor as a surveyor, done for defendant by lessor of plaintiff. The court charged the jury, that if it appears to the jury from the evidence that the said sum of £436, 5s. 4d. was not actually lent, but a less sum, so that the lessor of the plaintiff was to receive by virtue of the said deed and bond a sum of money for interest exceeding the rate of six per cent. per annum, on the consideration expressed in the said deed, that then the said deed was usurious and void. Verdict for plaintiff; defendant excepted. The Court of Appeals, June term, 1802, affirmed the judgment below. *Hogmire* v. *Chaplin*, 1 *Harris & Johnson*, 29.

11. A stipulation to repay the principal in money is not necessary to constitute a loan: it is enough if the principal is secured, and not *bona fide* put in hazard; and it matters not what the nature of the security is, if it is sufficient. As if a man borrow £20 to pay £10 for interest for one year, and pawns goods to the lender of the value of £100, on a stipulation in writing by the lender to return the goods on payment by the borrower of £30 with interest thereon;—this is an usurious lending, though there is no undertaking by the borrower to repay the principal. *Per Buchanan, Justice, in Tyson* v. *Richards*, 3 *Harris & Johnson*, 112.

12. A *qui tam* action was brought under the act of 1704, ch. 69, against usury for $450 debt. The declaration contained two counts, each demanding $450, on a corrupt agreement for a loan of $150, from 2d of September, 1805, to 5th of October, 1805, for which the lender was to receive $90, and for securing the payment thereof the borrower gave his promissory note to the lender for $240, payable in thirty days. Verdict (on nil debet pleaded) that the defendant owed the said sum of $450; and a judgment rendered thereon for $450 debt and $900 damages and costs, to be released on payment of $450 with interest, &c. On appeal, the judgment was reversed. *Bochme* v. *Aisquith, qui tam*, 4 *Harris & Johnson*, 207.

Whether a *qui tam* action will lie, where the usurious loan is for a less time than *one whole year*. (Quere.)

13. If a promissory note was drawn to borrow money at illegal interest, and the holder obtains money on it on a usurious consideration, the note is, under any circumstances, void. But if the note was *bona fide* in its origin, an innocent holder without notice may recover on it, though it may have been subsequently passed upon a usurious consideration. *Burt* v. *Given*, 4 *Harris & Johnson*, 507.

14. Whether a promissory note drawn to borrow money is usurious in its inception, because money has been obtained on it by the

holder, on a usurious consideration, although the drawer at the making the note, had no knowledge that such a use was to be made of it. *Quere. Ibid.*

15. Trover for goods mortgaged to secure a usurious debt cannot be sustained, unless the plaintiff has tendered the amount actually loaned. [*But subsequent decisions have changed the rule.*]

If the party by whom such debt is contracted becomes an insolvent debtor, his trustee, under the insolvent laws, is equally bound to make such tender to entitle him to recover the goods mortgaged. *Lewis* v. *Latour*, 6 *Harris & Johnson*, 100.

16. Where a bank calculated their discount on notes agreeably to Rowlett's tables, and had by mistake or error deviated from the tables, and not by intention from the rules prescribed by Rowlett, a case would be presented from which usury could not be deduced. *Duvall* v. *Farmer's Bank*, 7 *Gill & Johnson*, 61.

17. Mistake of two cents in a discount is not evidence of usury. 10 *Gill & Johnson*, 209.

SECTION XVI.

MASSACHUSETTS.

Revised Statutes, page 307. *Interest of money.*

SECTION 1. The interest of money shall continue to be at the rate of six dollars, and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time.

SECT. 2. No contract or assurance for the payment of money with interest at a greater rate than is allowed by the preceding section, shall be thereby rendered void; but whenever, in any action brought on such contract or assurance, it shall appear, upon a special plea to that effect, that a greater rate of interest has been directly or indirectly reserved, taken or received, than is allowed by law, the defendant shall recover his full costs, and the plaintiff shall forfeit threefold the amount of the whole interest reserved or taken, and shall have judgment for the balance only, which shall remain due after deducting said threefold amount.

SECT. 3. Whenever a greater rate of interest, than is allowed by law, shall have been paid, the party paying the same may recover back threefold the amount of the whole interest paid, either by an

action of debt, or by a bill in chancery: provided, that such action or bill shall be prosecuted within two years from the time when the said interest shall have been paid.

SECT. 4. In the trial of any action, wherein it shall appear by the pleadings, that the fact of unlawful interest having been taken or reserved is put in issue, it shall be lawful for the debtor (the creditor being alive) to become a witness, and he shall be admitted as such; and the creditor, if he shall offer his testimony, shall also be admitted as a witness, together with any other legal evidence that may be introduced by either party.

1. To entitle one to a moiety of the penalty for usury, it must appear on the record that he prosecuted, complained, or sued for it, and this within a year after the offence committed. The offence of usury is completed, if more than legal interest be paid at the time of the loan, whether the principal sum be ever repaid or not. If the lender on usury acts as agent for another, this will be no excuse for him, especially if he does not disclose the fact at the time of the transaction. *Commonwealth* v. *Frost*, 5 *Mass.* 53.

2. Borrower a competent witness. *Ibid.*

3. A conveyed to B land of the value of $1,600 for the consideration of $300; B at the same time agreeing to reconvey it upon payment of $522 97, at two instalments, the last within three years from the date of the contract; no part of the $522 97 were paid. It was held that B was not liable to a *qui tam* action for taking a usurious interest. *Thompson* v. *Moses*, 7 *Mass.* 361.

4. It is not usurious in a banking company to take their notes, payable in Boston bills, and, upon a renewal of the loan, to take a premium equal to the difference between those bills and other bills current at the place of the bank. Nor is such a transaction within the prohibition in the charter of such company to use their monies, &c., in trade or commerce. *Portland Bank* v. *Storer*, 7 *Mass.* 433.

5. Where more than legal interest has been taken on a loan of money, the mortgage or other security for such loan is not therefore void, unless the same was originally reserved therein, although the party may be liable to an indictment, or an action for the forfeiture given by the statute. *Gardner* v. *Flagg*, 8 *Mass.* 102. *See* 1 *Saund.* 295. 1 *Raymond*, 186. 1 *Mod.* 69. 1 *Ventris*, 38.

6. Where at the making of a promissory note bearing lawful interest from its date, an extra premium was also paid, the note was held to be usurious and void. *Thompson Ex'r* v. *Thompson*, 8 *Mass.* 135.

7. Where, by the terms of a contract, the party may, by payment at a day certain, avoid any stipulated penalty, such contract is not usurious. *Cullen* v. *How*, 8 *Mass.* 257.

8. A, owing B a sum of money, gave his promissory note, payable in six months in a specific commodity, at a lower rate than its current value; the note not being paid at the time it fell due, the creditor put it in suit, and afterwards adjusted the suit by taking a new note for the balance of the former at the low rate of the commodity, and made the new note also payable at a given day in a specific commodity at a lower rate than its current value. This last note was held to be usurious and void. *Cullen* v. *Johnson*, 8 *Mass.* 266.

9. In a writ of entry grounded on a mortgage, and a posterior release of the tenant to the demandant, the tenant is not entitled to prove usury by his oath under the provisions of the statute, 1783, ch. 55, sec. 2. *Wheaton* v. *Tisdale*, 9 *Mass.* 326.

10. Banking companies are within the provisions of the statute against usury. *Marine Bank* v. *Tisdale*, 9 *Mass.* 49.

11. A, owing B a sum of money for a valid consideration, and B owing C a sum on which usurious interest had been paid, it was agreed that A should give his note to C, including the usurious interest, and A was discharged of so much of his debt to B. *Held*, that the note so given by A to C was not void by the statute against usury. The verdict of the jury having negatived any contrivance to evade the statute. *Beavee* v. *Barstow*, 9 *Mass.* 45.

12. A being justly indebted to B, gave his promissory note for the sum due, agreeing to pay interest thereon at the rate of twelve per cent. per annum. After sundry payments of interest at the rate agreed on, and part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note, being in part paid, was also cancelled, and a third note given for the balance. This last note being endorsed, in an action by the endorsee against the promissor, it was holden not to be tainted with the usurious interest paid on the first note, and the endorsee had judgment. *Chadbourn* v. *Watts*, 10 *Mass.* 121.

13. An incorporated banking company loaned a sum of money at six per cent. discount, with an agreement on the part of the borrower to redeem the identical bank notes received by him on the loan, if they should be returned to the bank during the continuance of the loan, with specie, and also to purchase of the company with specie during the loan a certain amount of other bank notes not current at par. This was held to be a lawful agreement, and the note given to

secure the loan not usurious. *Northampton Bank* v. *Allen*, 10 *Mass.* 284.

14. For a debt of $130 the debtor gave a promissory note for $100, and another for $39, payable in thirty days, and they were both avoided as usurious. *Jones* v. *Whitney*, 11 *Mass.* 74.

15. A, being a co-surety with B, and having himself paid the debt, B, at his request, gave his negotiable promissory note to C, a stranger, in which usurious interest was included. C endorsed the note to A, and in an action by him against B, the note was avoided on account of the usury. It was holden that B was still answerable to A in an action upon the original implied promise. *Johnson* v. *Johnson*, 11 *Mass.* 359. *See H. Blackstone*, 1 *vol.* 462, *Gray* v. *Fowler*. *Croke Eliz.* 20. 1 *Saund.* 294.

16. Usury must be pleaded to an action on a specialty between the original parties; but in real actions a purchaser may avoid a prior conveyance from his grantor, by giving usury in evidence on the general issue of *nul disseizin*. The original parties have full knowledge of the consideration, and may, therefore, be properly held to notify the other party of the intended defence. There seems also a technical difficulty in giving usury in evidence under a plea of *non est factum*. But however this may be between the parties to the *instrument* intended to be avoided, *held*, that a subsequent purchaser of a title from a grantor, who has already executed a conveyance to another which by statute is void, is not holden to plead this matter, but may give it in evidence. He may not be apprised of such defence until it is too late to plead it; and when he offers to prove it, the adverse party may always have time given him to rebut such evidence. *Hills* v. *Elliott*, 12 *Mass.* 26.

17. A judgment was rendered upon default on a contract which included usurious interest; and the judgment debtor gave a new security by mortage for the amount of the judgment; and it was holden, in an action upon the mortage, that it was not competent for the mortagor to object to the usury. *Thatcher* v. *Garman*, 12 *Mass.* 268.

18. The reason of this decision would not apply to judgments on confession, or any other proceeding not *adversely* obtained.

19. A deed purporting an absolute conveyance of land, cannot be avoided or controlled in its construction, by an averment or by parol evidence of usury, or any condition or trust not expressed in such deed. *Flint* v. *Sheldon*, 13 *Mass.* 443.

20. One summoned as the trustee of an absconding debtor, to

whom he had conveyed certain real estate, was holden not to be bound to answer to an interrogatory, whether on monies loaned to the debtor, and which made part of the consideration of such conveyance, he had not received more than six per cent. interest. *Boardman* v. *Roe*, 13 *Mass.* 104.

21. A mortgage made upon an usurious consideration is void only as against the mortgagor, and those who may lawfully hold the estate under him; a purchaser of the *mere* equity of redemption cannot avoid the mortgage by plea or proof of usury. *Green* v. *Kemp*, 13 *Mass.* 515.

22. This was a mere right "*to redeem in terms*," and no words of bargain and sale sufficient to convey a title independent of the mortgage. *Aliter if it had been.*

23. A, being indebted to B on a note for usurious interest on former loans, asks for further credit, which B was willing to give, provided he had other security. A proposes to furnish a new note, to be signed by C, (who was endorser of the other note,) payable to D, and endorsed by him in blank, which was received by B in exchange for the former note. In an action upon the last note by E as endorsee against C the promissor, there being no evidence tending to show that the plaintiff knew of the origin of the note in suit, or that he was or was not a *bona fide* purchaser of it, it was holden that the note was void by the statute of usury. *Bridge et al.* v. *Hubbard*, 15 *Mass.* 96.

24. A receives B's note, payable at a day certain, and delivers him the amount secured by the note, deducting interest for the time the note has to run, at the rate of *two per cent. per month* on the $400. In an action by A on the note the defendant had judgment, on the ground that the contract sued was usurious. In an action for the penalty provided by the statute, it was holden that A was not liable. *Simpson qui tam* v. *Warren*, 15 *Mass.* 460.

25. It is competent for an administrator, in an action against him by an administrator of the promissee on a negotiable note made by his intestate, to prove such note to have been given upon an usurious consideration. A surety in such a note is a competent witness to prove such usurious consideration.

But the defendant administrator is not a competent witness, although the estate of his intestate is insolvent. *Fox et al. adm'rs* v. *Whitney, adm'r*, 16 *Mass.* 118.

26. Where the defendant pleads that by the contract sued there is *reserved* more than lawful interest, and tenders his oath, it is suffi-

cient for the plaintiff to reply that such interest is not reserved, and swear to the same, without averring that unlawful interest has not been taken or received. *Darling* v. *Hosmer et al.* 16 *Mass.* 288.

27. Where an endorsed promissory note was made and discounted for the benefit of the maker at usurious interest, and thus first put into circulation, the maker of the note was held an incompetent witness to prove the usury in an action against the endorser. *Hartford Bank* v. *Barry*, 17 *Mass.* 94.

28. One who had signed a negotiable promissory note as agent for the promissors, was holden to be an incompetent witness to prove the note usurious in an action by an endorsee against the promissors. *Packard* v. *Richardson* ,17 *Mass.* 122.

29. The court held, that merely discounting the interest on a note at the time of receiving it, is not of itself conclusive evidence of usury. It might be evidence of a design to evade the statute, but that was a question for the jury. *Lyman* v. *Moore*, 1 *Pick.* 295.

30. In an indictment for usury, it is necessary to set forth the time of making the usurious contract, and the time being material, must be proved as set forth. *Corwin* v. *Harrington*, 3 *Pick.* 26.

31. Where a contract is attempted to be avoided or enforced by the oath of a party, pursuant to statute 1783, ch. 55., sec. 2, which provides, that if the debtor or debtors shall offer to make oath, &c., that usury has been reserved or taken, the contract shall be void, unless the "creditor or creditors" will swear to the contrary; all the debtors or all the creditors must offer to swear, and, if required, must actually swear, respectively, that there was or was not usury. *Knights* v *Putnam*, 3 *Pick.* 171.

32. A promissory note bearing interest from a time anterior to the note, is not, on the face of it, usurious. *Holden* v. *Pollard*, 4 *Pick.* 173.

33. A transfer by endorsement of a note, for a usurious consideration, is neither void or voidable; it is an executed contract. *Knights* v. *Putnam*, 3 *Pick.* 184.

34. Usury between the endorser and endorsee, in the transfer of a negotiable note, only affects the promise of the endorser, and cannot be set up in defence in an action by the endorsee against the maker, consequently the endorser cannot be admitted as a witness to prove such usury. *Ibid.*

35. If a note made for the purpose of raising money is discounted at a higher premium than the legal rate of interest, and none of the parties whose names are on it can, as between themselves, main-

tain a suit on the note, when it becomes mature, provided it had not been discounted; then such discounting is usurious, for it is then that it first exists as a contract. *Ibid.*

36. Under the statute of 1783, ch. 55, before it was repealed, a loan of money on a promissory note, for the money and interest at six per cent. per annum, with an oral promise to pay two per cent. additional interest, was not a usurious contract, as this oral promise was void, and accordingly such note was valid. *Butterfield* v. *Kidder*, 8 *Pick.* 512.

37. Where A passed over to B certain notes of a third person as a part of the consideration for a usurious note, made at the time by B, payable to A; B, in case of his avoiding the usurious note on the ground of usury, cannot be compelled to restore the notes so given as part of the consideration. *Train* v. *Collins*, 2 *Pick.* 145.

38. The maker of a negotiable note, which he alleges to be usurious, cannot object that an action upon it against him is brought in the name of an endorsee, at the request and for the benefit of the payee. Under the statute of 1826, ch. 27, one who reserves usurious interest on a contract, forfeits threefold the whole interest, usurious as well as lawful. *Brigham* v. *Moriam*, 7 *Pick.* 40.

39. Where a creditor of an estate gave up his securities to an executor, who had given bond for the payment of debts and legacies, on the executor's promising to pay him the amount of his debt, and the executor gave his note for the amount, which was avoided for usury; it was held, that the giving the note did not extinguish the parol promise, upon which an action might still be maintained. *Stibbins* v. *Smith*, 4 *Pick.* 97.

40. In an action upon a promissory note, upon which usurious interest has been taken and reserved, it was held, that under the statute of 1826, ch. 27, the interest reserved was to be computed to the time of the verdict, and to be added to the principal; and from this amount was to be deducted threefold the whole interest taken and reserved, computed as above; and that the plaintiff was entitled to judgment for the balance, with interest thereon from the time of finding the verdict to the time of rendering the judgment. *Parker* v. *Biglow*, 14 *Pick.* 436.

41. What would have been the effect of fraudulent conduct on the part of the defendant, or of unnecessary delay caused by him for the purpose of increasing the forfeiture. *Quere. Ibid.*

42. In an action on a promissory note, payable in one year, "with nine per cent. interest," the forfeiture to be deducted under the Revised

Statutes, ch. 55, sect. 2, is only three times the amount of nine per cent. for one year, that being threefold the amount of the whole interest reserved. *Summers* v. *Williams*, 1 *Metcalf*, 398.

43. The inception of a note, made payable to the maker's own order and by him endorsed, is upon its endorsement; and therefore where, in a suit thereon by the first endorsee, the jury were instructed that if they believed it was usurious in its inception, they should deduct the forfeiture of threefold interest reserved; the instruction was held to be right. *Little* v. *Rogers*, 1 *Metcalf*, 108.

44. A party who pays a greater rate of interest than is allowed by law, cannot recover back threefold the amount of interest paid, by an action of trespass in the case, but only by an action of debt or a bill in chancery, as prescribed by the Revised Statutes, ch. 35, sect. 3. *Wiley* v. *Yal*, 1 *Metcalf*, 553.

45. It is a good defence to an action by endorsee against the endorser of a note endorsed for the accommodation of the maker, that the endorsee received the note as security for the performance of a usurious contract between him and the maker. In an action on a note made and negotiated in another state, the question whether such note is void for usury, must be decided by the law of that state. By the law of New York, a note, though given for no more than the amount of the money loaned, is usurious and void, if the borrower, at the time of the loan, agrees to pay the lender more than legal interest. *Dunscomb* v. *Bunker*, 2 *Metcalf*, 8.

46. Where something besides interest, as such, is allowed on a loan and forbearance of money, it is a question of fact for the jury, whether the contract is fairly and honestly made, or whether it is a cover for usury. *Stevens* v. *Davis*, 3 *Metcalf*, 211.

SECTION XVII.

MICHIGAN.

An act relating to interest on contracts.

SECTION I. *Be it enacted by the Legislative Council of the Territory of Michigan*, That no person or persons, upon any contract hereafter to be made, shall recover or take, directly or indirectly, more than the value of seven dollars for the forbearance of one hundred dollars for a year, and so after that rate, for a greater or less sum, or for a longer or

shorter time; and any person who shall, upon any contract, take, accept or receive, by way or means of any corrupt bargain, or by covin or deceitful conveyance, or by any other ways or means whatsoever, for the forbearance, on giving day of payment for one whole year, above the sum of seven dollars for the forbearance of one hundred dollars, for one year, and so after that rate, for a greater or less sum, or for a longer or shorter time, shall forfeit and pay, for every such offence, the whole of the usurious part of said contract, and twenty-five per centum interest on said contract, one moiety to the treasury of this territory, and the other moiety to the person who shall prosecute the same to effect before any court of competent jurisdiction. *Provided, nevertheless,* That nothing in the act shall extend to the letting of cattle, or other usages of like nature practised among farmers, or maritime contracts, bottoming, or other course of exchange as hath heretofore been customary.

Approved, April 20th, 1833.

SECTION XVIII.

MISSISSIPPI.

Chap. 69. *An act regulating the rate of interest. Passed June* 25, 1822.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Mississippi, in general assembly convened,* That no person or persons whomsoever, shall take directly or indirectly, for any contract, bond or note, for the payment of money, founded on any bargain, sale or loan of wares and merchandise, goods and chattels, lands and tenements, or any use or occupation thereof, more than eight dollars for the forbearance or giving day of payment, of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time. And if it shall be ascertained on the plea or answer of the defendant in any suit, that more than the rate of eight dollars for the forbearance or giving day of payment of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, be taken or received, in or by any such contract, bond or note, no interest or premium whatever, for forbearance or giving day of payment, shall be allowed or recovered on such contract, bond or note; but the principal sum only may be recovered.

SECT. 2. The rate of ten dollars for the forbearance or giving day of payment of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, may be taken, allowed and recovered on all contracts, bonds or notes in writing, signed by the debtor for the *bona fide* loan of money, expressing therein the rate of interest fairly agreed on between the parties for the use of the money so loaned: *Provided*, that if any contract, bond or note, founded on any other consideration than the *bona fide* loan of money, shall fraudulently and deceitfully express therein that the same is entered into or given for money lent, and specify a rate of interest above the sum allowed by this act, if such fraud or deception shall be discovered in any suit or action, either in law or equity, no interest or premium whatever shall be allowed or recovered on such fraudulent contract, bond or note, but the principal sum only shall be recovered. And if it shall be ascertained on the plea or answer of the defendant, in any suit, that more than the rate of ten dollars for the forbearance or giving day of payment, of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, be taken or received in or by any such contract, bond or note, no interest or premium whatever for forbearance or giving day of payment, shall be allowed or recovered on such contract, bond or note, but the principal sum only shall be recovered.

SECT. 3. The rate of eight dollars for the forbearance or giving day of payment of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, may be taken, allowed and recovered on all contracts, bonds and notes in writing, signed by the debtor, orders, bills of exchange and accounts stated, which ascertain the sum due, after the same is due and payable; and on all judgments and decrees founded on contracts, debts or demands, bearing interest, the rate of interest shall be the same as that allowed by law on the contract, debt or demand, on which such judgment or decree shall be founded; and on judgments and decrees in all other cases, the rate of interest shall be eight per cent. per annum.

SECT. 4. This act shall commence and be in force from and after the first day of September next.

To constitute usury, there must be an agreement between the lender and borrower of money, by which the borrower knowingly gives or promises, and the lender knowingly takes or receives a higher rate of interest than the law allows, and with an intention to violate the statute. It seems, that if a special verdict of a jury find that there is an agree-

ment by which the lender knowingly takes illegal interest, the court may infer an intention to violate the statute, but this inference can only be indulged, when no other conclusion would be consistent with the facts found on the verdict. Where, in the adjustment and renewal of a claim, an additional amount was voluntarily paid, and included on an account of expenses, and not as the condition of the loan, it was held not to affect the contract with usury. *Planters' Bank* v. *Snodgrass*, 4 *Howard's R.* 573.

By the act of 1805, no more than six per cent. could be taken, and all over that, void. These provisions continued until 1818, when the constitution adopted, as an experiment, that "The General Assembly shall pass no law impairing the obligations of contracts prior to the year 1821, on account of the rate of interest fairly agreed in writing between the contracting parties for a *bona fide* loan of money. But they shall have power to regulate the rate of interest, where no special contract exists in relation thereto." The act of 1818 carried out the principle imposing no forfeiture for usury, and this continued until 1822, when Poindexter's code embodied a forfeiture of interest in certain cases.

SECTION XIX.

MISSOURI.

Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. Creditors shall be allowed to receive interest at the rate of six per centum per annum, when no other rate of interest is agreed upon, for all monies after they become due by any instrument of the debtor in writing, or money lent, or money due on settlement of accounts, from the day of liquidating accounts and ascertaining the balance; on money received for the use of another, and retained without the owner's knowledge of the receipt; on money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts, and on all other money due or to become due, for the forbearance of payment whereof an express promise to pay interest has been made.

SEC. 2. The parties may agree in writing for the payment of interest, not exceeding ten per centum per annum, on money due or to become due upon any contract.

SEC. 3. Interest shall be allowed on all money due by judgment at law, or decrees in equity, from the day of rendering them until sat-

isfaction be made by payment, or sale of property; judgments and decrees for money upon contracts bearing more than six per cent. interest, shall bear the same interest borne by such contracts, and all other judgments and decrees for money, shall bear six per centum per annum until satisfaction made as aforesaid.

Sec. 4. No person shall, directly or indirectly, take for the use or loan of money or other commodity above the rates aforesaid, for the forbearance or use of one hundred dollars, or the value thereof, for one year; and if any person shall, directly or indirectly, receive any obligation, promise, money or other commodity, as a premium or reward, or by any other name, to the end of obtaining any higher rate of interest than before provided, on any contract which shall hereafter be made, and shall institute a suit upon such contract, it shall be lawful for the defendant in the suit to set forth the special facts in pleading, as a bar of so much of the real sum of money, or price of the commodity, actually due, lent, advanced or sold, as shall be the amount of such premium allowed, or sum so secured or received, above the rates aforesaid; and if the plea of the defendant be sustained, the plaintiff shall recover no more than the remainder of the amount really due, after deducting such premium, or excessive reward or interest, without allowing any interest on the principal; and if the premium, or usurious interest and costs, exceed the principal or real sum of money, or price of the commodity actually due, lent, advanced or sold, the excess shall be deemed a debt of record, upon which the defendant may, on motion, have judgment.

Approved, December 11th, 1834.

SECTION XX.

NEW HAMPSHIRE.

Title 26. *Usury. Chapter* 1. *An act to restrain the taking of unlawful interest.*

Section 1. *Be it enacted by the Senate and House of Representatives, in general court convened,* That no person or persons, upon any contract which shall be made, shall take either directly or indirectly, for the loan of any money, wares, merchandise, or any other personal estate whatever, above the value of six pounds for the use and forbearance of one hundred pounds for a year, and after that rate for a greater or less sum, or for a longer or shorter time.

And all and every person and persons who shall hereafter upon

any contract take, accept and receive by way or means of any corrupt bargain, loan, exchange, or by covin, or deceitful conveyance, or by any other way or means, for the forbearing or giving day of payment for one whole year of, and for their money, or other personal estate above the sum of six pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or less sum, or for a longer or shorter time, shall forfeit and lose for every such offence, three times the sum above the lawful interest so taken: one moiety to the use of the prosecutor, and the other moiety to the use of the county in which the offence is committed, with costs of prosecution.

SEC. 2. *And be it further enacted*, That when any person or persons shall be sued on any bond, contract, mortgage, or any assurance given, or made hereafter, for the payment of any money, goods, or personal estate, whereon or whereby any sum is given, secured or taken for the forbearing or giving day of payment, more than the lawful interest, that is, more than at the rate before mentioned, then if the debtor or debtors (the creditor being alive) shall come into court where the cause is to be tried, and shall offer to make oath, and if required by the court, actually swear that there is taken, received or secured by such bond, contract, mortgage, or assurance above the rate of six pounds in the hundred for the forbearance of the same, whether it be for money or other things for one year, and so after that rate, for any greater or less sum, or for a longer or shorter time, or that the creditor or creditors have received more than after the rate of six pounds in the hundred for the forbearance, or loan of any sum of money or other personal estate, or thing sued for per annum, in rendering judgment upon such bond, contract, mortgage or assurance, the court shall deduct from the sum lawfully due, by or upon such contract or other assurance as aforesaid, a sum equal to three times the sum above the lawful interest taken, secured, given or received on or by such contract, or other assurance; unless the creditor or creditors will swear that he, she or they, have not directly or indirectly, willingly taken or received more than after the rate of six per cent. per annum, for forbearance, or giving day of payment, and that by such bond, contract, mortgage or assurance, there is not reserved, secured or taken more than after the rate of six per cent. per annum for forbearance or giving day of payment for the money, goods or things sued for or demanded.

Provided always, That nothing in this act shall extend to the letting of cattle, or other usages of the like nature, in practice among farmers, or to maritime contracts among merchants, as bottomry, insurance, or course of exchange, as hath been heretofore used.

Passed February 12, 1791.

1. The receipt of more than legal interest for past forbearance is usury, and the excess may be recovered back in assumpsit. *Willer* v. *Green*, 2 *N. H.* 333.

2. If a contract made in another state by its citizens, be wholly usurious according to its laws, no recovery can be had on it here. *Houghton* v. *Page*, 2 *N. H.* 42.

3. If there be usury in a negotiable note, it cannot be set up against a *bona fide* holder of the note, who purchases it without knowledge of the usury. *Young* v. *Berkley*, 2 *N. H.* 410.

4. It is not illegal to receive compound interest for the giving day of payment. *Dew* v. *Dew*, 3 *N. H.* 40.

5. Where a defendant alleges that more than lawful interest has been secured or reserved, on the contract on which the suit is founded, and offers to verify his allegation by his oath, he is entitled to the deduction for which he prays, unless the plaintiff make oath that no unlawful interest was secured or reserved, or that a certain sum and no more was unlawfully reserved or secured. It is not sufficient for the plaintiff to make oath that the allegations of the defendant are not true. *Copeland* v. *Jones*, 3 *N. H.* 116.

6. In a suit upon a promissory note between the maker and endorsee, a plea of usury will be rejected, if the endorsee will make oath that the note was *bona fide* transferred to him, before due, for a good consideration, without notice of any usury in the note. But in such case the plaintiff must not demur. *Forbes* v. *Marsh*, 3 *N. H.* 119.

7. More than legal interest reserved or secured through a mistaken calculation creates no forfeiture. A deduction of the amount forfeited, under the statute of usury, can be made only in suit brought to recover the money on which the unlawful interest was reserved or secured, or interest on that money; and such money and interest alone are subject to the deduction. When unlawful interest has been secured or reserved for the forbearance of a sum of money, the debt remains liable to the deduction of the forfeiture between the parties to the usury, notwithstanding the security may have been changed. When the amount of the forfeiture exceeds the sum lawfully due, the usury may be pleaded in bar. *Gibson* v. *Stearnes*, 3 *N. H.* 185.

8. Where, in an action upon a note brought in the name of the endorsee, the defendant pleads usury and tenders his own oath—it is no answer to the plea that the payee is out of the state, in parts unknown to the plaintiff, so that he cannot be produced to make oath to the replication. In a plea of usury, where the defendant tenders his own oath, it is not necessary to set out the corrupt agreement at large.

But in general it is enough, to allege that the illegal interest was taken or secured under a corrupt agreement to give day of payment of money for which the action is brought, the amount of the illegal interest taken or secured, and the sum that is lawfully due on the contract. *Olcott* v. *Alden*, 6 *N. H.* 516.

9. In a suit by an endorsee of a promissory note, if the defendant offers to verify a plea of usury by his own oath, it should contain an averment that the payee of the note is alive.

A plea of usury ought to state the amount of usury reserved or secured. An administrator who has given his promissory note for a sum due from his intestate, including certain unlawful interest which the intestate had agreed to pay, cannot in a suit upon the note sustain a plea of usury, on account of the unlawful interest so agreed to be paid by the intestate and included in it. *Little* v. *White*, 8 *N. H.* 276.

10. Usury, where three times the amount of the usury taken does not extend to the whole amount of the demand sued, should not be pleaded in bar, but the plea should pray a deduction of three times the amount from the sum lawfully due. *Tappan* v. *Prescott*, 9 *N. H.* 531.

11. If there are several defendants, and all answer to the action, and intend to avail themselves of a plea of usury, all should regularly join in the plea, although it may perhaps be verified by the oath of one alone. But if one is defaulted another may plead usury, and the party who is defaulted have the benefit of the defence. *Ibid.*

12. In pleading usury, where more than one sum has been taken, over and above lawful interest, on the same loan, there should not be a plea of usury for each sum so taken, but the whole amount of the usury should be stated in a single plea. Whether double pleading is allowable under the statute, *Quere*. *Ibid.*

13. The sum taken as usury should be specifically stated in the plea, in order that the court may see what sum is to be deducted, if the defendant prevails. *Ibid.*

SECTION XXI.

NEW JERSEY.

An act against usury. Passed the 8th of February, 1797. (Revised Laws, 269.)

SECTION 1. No person shall, upon any contract, take directly or indirectly, for loan of any money, wares, merchandise, goods or chattels, above the value of seven dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum, or for a longer or shorter time.

SECT. 2. All notes, bills, bonds, mortgages, contracts, covenants, conveyances, and assurances, which shall be made for the payment or delivery of any money, wares, merchandise, goods, or chattels, so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void.

SECT. 3. If any person shall, by way or means of any bargain, agreement, contract, loan, exchange, shift, covin, device, contrivance, deceit or conveyance, take, accept, or receive, directly or indirectly, for the loan of, or the forbearing or giving day of payment, for any money, wares, merchandise, goods or chattels, above the value of seven dollars for one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time, every person so offending, shall forfeit the full value of the money, wares, merchandise, goods or chattels so lent, sold, bargained, contracted for, or exchanged; one moiety to the use of the state, and the other to the prosecutor, to be recovered, with costs, by action of debt, or on the case, in any court of record having cognizance thereof.

SECT. 4. Any borrower of money, wares, merchandise, goods or chattels, may exhibit a bill in chancery against the lender, and compel him or her to discover, upon oath or affirmation, the money or wares, merchandise, goods or chattels, really lent, and all agreements, devices, shifts, bargains, contracts and conveyances, which shall have passed between them relative to such loan, or the repayment thereof, and the interest or consideration for the same, and if thereupon it shall appear, that more than lawful interest was taken or reserved, the lender shall be obliged to accept his principal money, or the wares, merchandise, goods or chattels, or the value thereof, without any interest, or other consideration, and pay costs; but shall be discharged from all other penalties of this act: *Provided always*, such bill be

exhibited before any suit shall have been instituted by virtue of the section next preceding.

SECT. 5. Every solicitor, scrivener, broker or driver of bargains, who shall, directly or indirectly, take or receive more than the rate, or value of fifty cents for brocage, or soliciting, or procuring the loan or forbearance of one hundred dollars for a year, and so in proportion for a greater or less sum, or for a longer or shorter time, or above twenty-five cents for drawing, making, or renewing the bond or bill for such loan or forbearance, or for any counter bond or bill concerning the same, shall, for every such offence, forfeit sixteen dollars, to be recovered by action of debt, with costs, by any person who shall sue for the same, the one moiety to the prosecutor, and the other to the state.

Supplement, passed the 5th of December, 1823.

SECT. 1. From and after the fourth day of July next ensuing, no person shall, upon any contract, take, directly or indirectly, for loan of any money, wares, merchandise, goods or chattels, above the value of six dollars, for the forbearance of one hundred dollars for a year, and after that rate, for a greater or less sum, or for a longer or shorter time.

SECT. 2. The several sections and provisions in the said act, to which this is a supplement, concerning the rate of interest therein mentioned and allowed, shall be deemed and taken to be in force, and apply after the fourth day of July, as aforesaid, to the rate of interest herein mentioned and allowed, and as if six per centum, and not seven per centum per annum, was mentioned as the rate of interest in the said several sections and provisions: *Provided*, nothing in this act contained, shall be construed to impair the obligation of any contract made before the fourth day of July, as aforesaid, for the loan of any money, wares, merchandise, goods or chattels, or the interest taken, reserved, due, or growing due thereon; but as well any such contract of loan, as any other contract made before the said fourth day of July, and the interest reserved, or to be allowed or taken thereupon, shall be and remain and continue, as if this act had not been passed.

1. No subsequent taking or agreement to take illegal interest will invalidate a bond or other security originally free from corruption, and this has been the uniform construction given to the second section of the act against usury. *Sloan* v. *Lomas*, 2 *Green R.* 510.

2. A note antedated, so as to entitle the payee to receive and

demand more than the legal rate of interest, is usurious and void under the statute. *Ex'rs of Williams* v. *Williams*, 3 *Green*, 255.

3. The sale of a promissory note or bill is one thing, and the *transfer* of it by general endorsement on a discount, is another. *Brittin* v. *Freeman*, 2 *Harrison R.* 191.

4. On the sale of a note or bill, though the vendor obtain for it a sum far below its real or apparent value, there can be no usury, unless such sale was only a device to evade the statute against usury. *Ibid.*

5. If a party, making a discount in the ordinary course of trade, and looking to the endorser, upon his contract of endorsement for ultimate indemnity, retain more than legal interest, it is not necessarily and *per se* usurious; it may be so, or it may not; at most it will only be *prima facie* usurious, and be so considered, unless it be shown that the excess was taken for a lawful purpose, and constituted no part of the contract or condition on which the discount was made. *Ibid.*

Whether the transfer or discount of a note is usurious or not, is a question of fact for the jury under the direction of the court. *Ibid.*

6. If the contract between endorser and endorsee be usurious, the latter can maintain no action against the maker or any prior party to the instrument, though good in its creation. But if a note, for value received, or for accommodation only, be fairly negotiated by the *payee*, and a subsequent party endorse it on usurious discount, and it afterwards gets into the hands of a *bona fide* endorsee, without notice of the usury, he may strike out the names of the usurious parties, and make title through the payee or any innocent endorser subsequent to him, and recover upon the note.

7. An endorser of a note is a competent witness to prove, 1st, that he obtained it at a discount exceeding legal interest; and 2d, that in doing so he acted as agent for the plaintiff, the endorsee, and had no interest in the transaction. The rule adopted in the case of *Walton* v. *Shelly*, 1 *Term R.* 296, is not considered law in the state of New Jersey. *Ibid.*

8. A disinterested endorser of a promissory note is a competent witness to prove the usurious transfer of the note. *Heath* v. *Evertson*, 2 *Harrison*, 245.

9. *Semble*, the mode of bank calculation of thirty days to a month, and three hundred and sixty days only for a year, and discounting on such calculation is usurious, if it is intended thereby to receive more than six per cent. per annum interest. *Sussex Bank* v. *Baldwin*, 2 *Harrison*, 496.

10. The law will infer a corrupt intent, when the fact of taking more than six per cent. knowingly, is proved, but it cannot infer such intent when it is done in ignorance and mistake of facts. *Ibid.*

11. If a charge of one per cent. for a draft be unreasonable, and part of the original contract to discount a note, and if it were made corruptly as a contrivance, and with a design to evade the statute, it is usurious. *Ibid.*

12. In debt on bond, a plea stating generally, as in the case of *Shotwell's Ex'rs* v. *Dennis et al.* 2 *Green*, 501, that the bond was given upon an usurious and corrupt agreement, without setting out wherein the usury consisted, will be struck out on motion. The case in 2 *Green* reviewed. *Couperthwaite* v. *Dummer*, 3 *Harrison*, 258.

13. In an action upon a promissory note, brought by the payee against the drawer, it is competent for the defendant to prove, by parol testimony, that at the time of giving the note, it was agreed that the drawer should pay more than legal interest. *Crawford* v. *Deynse & Disbrow*, 3 *Harrison*, 325.

14. The payment and receipt of usurious interest is *prima facie* evidence of an usurious contract. *Ibid.*

15. A plea alleging that the assignment of a bond was made in pursuance of a corrupt agreement for the loan of money, by which more than six per cent. interest is reserved, contrary to the statute, is defective, inasmuch as the declaration charges and the plea admits, by not denying that the assignment was made at and in the state of New York, and the statute referred to in general terms is that of New Jersey. This defect is not supplied by the venue. Whenever the place is material, it should be stated in direct terms. *Bennington Iron Co.* v *Rutherford*, 3 *Harrison*, 467.

16. On a demurrer to a replication that it does not allege, nor does it appear by the company's charter that they have any power to take more than six per cent. per annum: *Held*, that it need not so appear. Corporations, as natural persons, may contract for any rate of interest, unless restrained by statute; and this is a matter of defence, and the power need not be shown by the plaintiff's pleading. *Ibid.*

17. To constitute usury, under the statute of New Jersey, there must be a *contract* in violation of the act. *Howell's Ex'rs* v. *Auten*, 1 *Green Ch. R.* 44.

18. If a party agree to lend money at a legal rate of interest, and after completing the contract, and receiving the borrower's obligation for the money, withholds a part of the amount loaned, in violation of the agreement of the parties, the obligation is not thereby tainted

with usury, although the money be withheld by the lender as a premium for the loan. *Ibid.*

19. The obligation is, in such case, a valid security for the amount actually advanced upon it, but no more. The borrower will be entitled to a credit for the amount withheld in violation of the agreement. *Ibid.*

20. The selling of goods or stock, or property of any kind, at a price beyond its value, as part of a loan, by way of cover or pretext for obtaining more than the legal rate of interest, will taint the whole transaction with usury, and destroy the validity of the instrument given for the loan. *Grosvenor* v. *Flax & Hemp Manf. Co.* 1 *Green Ch. R.* 453.

21. Proof that part of the loan was advanced in goods or stock, will not throw on the opposite party the burden of proving the value of such goods or stock. The person charging the usury must prove, not only that the goods or stock constituted a part of the loan, but also that they were put off at a price beyond their value. *Ibid.*

22. A decree was entered in chancery of New Jersey, on the 8th of April, 1826, in a suit wherein David Maxwell and Elias Crane were complainants, and William Curtis and others defendants, for the sale of certain mortgaged premises. Execution issued on such decree to the sheriff of Essex county, who returned the same "satisfied without sale." This return appears to have been made in consequence of one William Roberts having given a new mortgage to William S. Sears, of New York, for the amount of the decree, and New York interest for further forbearance. This agreement for forbearance was made, and the mortgage was executed in New York upon New Jersey lands. On the 20th of November, 1827, Sears filed his bill to foreclose his mortgage, so given by Roberts, in chancery of New Jersey. Roberts pleaded usury in the mortgage. A decree was however made in favor of the complainant, from which Roberts appealed to the Governor and Council, sitting as a court of last resort in all cases of law and equity, where the following decree was ordered to be made in the court of chancery. Between William S. Sears, complainant, and William Roberts, Jun., and Joseph Ogden, defendants. Upon reading and filing the petition of William Roberts, Jun., one of the defendants in this cause, it appearing to the court that the bond and mortgage mentioned in the complainant's bill of complaint, executed by the said William Roberts, Junior, to the said William S. Sears, bearing date the seventh day of October, one thousand eight hundred and

twenty-six, to secure unto the said William S. Sears,[1] on or before the seventh day of October, one thousand eight hundred and twenty-seven, the payment of the sum of two thousand dollars, with interest thereon, at the rate of seven per cent., payable semi-annually, have been decreed by the court of appeals in the last resort in all cases of law and equity to be usurious and utterly void. It is, therefore, on the 16th day of April, 1835, ordered, on motion of Henry W. Green, of counsel with the said William Roberts, Junior, that the said bond and mortgage be delivered up to be cancelled. *MS. case.*

23. Afterwards, on a bill filed by the assignee of Sears to set aside the return of the sheriff of Essex county, and enforce the original decree, a plea in bar was filed, setting up the decree declaring the mortgage of Sears to be void; but overruled by Chancellor Pennington as being no bar to the latter bill, and that the original claim was not infected with usury by the usurious mortgage taken by Sears. *Matthews* v. *Roberts*, 1 *Green Ch. R.* 338.

24. C, a resident of New Jersey, applied in the city of New York to V, who was also a resident of New Jersey, for a loan of money, which was agreed to be lent in New York, at seven per cent. per annum; and afterwards, to secure the loan, a mortgage was executed in New Jersey, upon lands in that state, but reserving six per cent. interest only in the mortgage. Interest was successively paid, at seven per cent., on the loan, as per agreement, and such payments were endorsed upon the mortage. On bill filed to foreclose the mortgage, and usury set up as a defence, *Held*, per Chancellor Dickinson, that the endorsement of seven per cent. interest upon the mortgage was no evidence of seven per cent. interest having been received or taken upon the mortgage; but that such receipt was evidence of that rate of interest having been paid upon the loan made in New York, and the mortgage, having called for but six per cent., was lawful. And the decree was for complainant, for principal and New Jersey interest. *Varick's Ex'rs* v. *Crane*, *MS. case.* Furnished by the Hon. P. Bentley, Mayor of Jersey City.

[1] Mr. Sears informed me, that the defendants set up a sale of stock as forming part of the alleged usury contained in the mortgage. But that would have made no difference, as the statute of usury set out by the defendants was that of New Jersey, under which seven per cent. was as much usury as the sale of stock could have been; and such appears to have been the opinion of the Court of Appeals, from the language used.

SECTION XXII.

NEW YORK.

1 Revised Statutes, page 771, Title III, Chap. 4, Part 2. Of the interest of money.

SECTION 1. The rate of interest upon the loan or forbearance of any money, goods or things in action, shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time.

SECT. 2. No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way any greater sum or greater value for the loan or forbearance of any money, goods or things in action, than is above prescribed.

SECT. 3. Every person who, for any such loan or forbearance shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered above the rate aforesaid, if such action be brought within one year after such payment or delivery.

SECT. 4. If such suit be not brought within the said one year, and prosecuted with effect, then the said sum may be sued for and recovered with costs, at any time within three years after the said one year by any overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county in which the payment may have been made.

SECT. 5. See act of 1837.

SECT. 6. Every person offending against the provisions of this title, shall be compelled to answer on oath any bill that may be exhibited against him in the Court of Chancery, for the discovery of any sum of money, goods or things in action so taken, accepted or received in violation, of the foregoing provisions, or either of them.

SECT. 7. Every person who shall discover and repay or return the money, goods or other things so taken, accepted or received, or the value thereof, shall be acquitted and discharged from any other or further forfeiture, penalty or punishment, which he may have incurred by taking or receiving the money, goods or other thing so discovered and repaid, or returned as aforesaid.

SECT. 8. Whenever any borrower of any money, goods or things in action, shall file a bill in chancery for a discovery of the money, goods or things in action, taken or received, in violation of either of the foregoing provisions, it shall not be necessary for him to pay, or offer to pay any interest whatever on the sum or thing loaned; nor shall any Court of Equity require or compel the payment or deposit of the principal sum, or any part thereof, as a condition of granting relief to the borrower, in any case of a usurious loan forbidden by this chapter.

SECT. 9. For the purpose of calculating interest, a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month, shall be estimated by the proportion which such number of days shall bear to thirty.

SECT. 10. Whenever in any statute, act, deed, written or verbal contract, or in any public or private instrument whatever, any certain rate of interest, is or shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned, by the year, in the same manner as if the words "per annum" or "by the year," had been added to such rate.

Session of 1837, *page* 486, *chapter*, 430. *An act to prevent usury. Passed May* 15, 1837.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The fifth section of title three of chapter four, part two, of the Revised Statutes, is hereby amended, so as to read as follows:

SECT. 5. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, (except bottomry and respondentia bonds and contracts,) and all deposites of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void; but this act shall not affect such paper as has been made and transferred previous to the time it shall take effect.

SECT. 2. Whenever in an action at law the defendant shall plead or give notice of the defence of usury, and shall verify the truth of

his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness, in the same manner as other witnesses may be called and examined.

SECT. 3. Every person offending against the provisions of the said title, or of this act, may be compelled to answer on oath any bill that shall be exhibited against him in the Court of Chancery, for relief or discovery, or both.

SECT. 4. Whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the said title or of this act, it shall not be necessary for him to pay, or offer to pay any interest or principal on the sum or thing loaned; nor shall any Court of Chancery require or compel the payment or deposite of the principal sum or interest, or any portion thereof, as a condition of granting relief or compelling or discovering to the borrower in any case, usurious loans forbidden by said title or by this act.

SECT. 5. Whenever it shall satisfactorily appear by the admissions of the defendant or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of the provisions of said title, or of this act, the Court of Chancery shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled.

SECT. 6. Any person who shall, directly or indirectly, receive any greater interest, discount or consideration, than is prescribed in the said title, and in violation of the provisions of said title or of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, the person so offending shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both.

SECT. 7. It shall be the duty of all courts of justice to charge the grand jury especially to inquire into any violations of the provisions of the said title or of this act.

SECT. 8. Every plaintiff examined as a witness pursuant to the provisions of this act, or any defendant under the provisions of this act, who shall swear falsely, shall, upon conviction thereof, suffer the pains and penalties of wilful and corrupt perjury; but the testimony given by any plaintiff, or the answer of any defendant, made pursuant to the said title or of this act, shall not be used against such person before any grand jury, or on the trial of any indictment against such person.

SECT. 9. So much of title third, chapter fourth, and part second of the Revised Statutes, as is inconsistent with the provisions of this act, is hereby repealed.

SECT. 10. This act shall take effect on the first day of July next.

1. A lends B $687, to be repaid on a certain day, with interest, and B, in consideration of the loan and forbearance, purchases of A 16 shares of turnpike stock, for the sum of $400, when, in truth, the real price of the shares was $250, and gives his bond for the $687, together with the $400 for the stock: the sale of the stock being merely colorable, the transaction is usurious, and the bond void. *Rose* v. *Dickson*, 7 *J. R.* 196.

2. Whether, when a bond is given for the purchase money of lands, at which time the vendor, by his agreement, is to execute a deed to the vendee, and also promissory notes for the interest of the bond, at a higher rate than the legal interest of the place where the agreement is made, such notes are to be considered as usurious, or as constituting part of the price of the land. *Quere. Van Shaick* v. *Edwards*, 2 *J. Cas.* 355.

3. A contract usurious in its inception cannot afterwards be rendered valid; so, a note given for a usurious consideration will be void in the hands of a *bona fide* endorsee, without notice of the usury. *Wilkie* v. *Roosevelt*, 3 *J. Cas.* 206.

4. A note endorsed for the accommodation of the maker, and passed by him as security for a usurious loan, is a usurious contract in its inception, as the lender is, in fact, to be considered the first holder of the note. *Jones* v. *Hake*, 2 *J. Cas.* 60. *Wilkie* v. *Roosevelt*, 3 *J. Cas.* 66—206.

5. An absolute deed of conveyance of real estate upon trust, to sell and pay certain debts, cannot be avoided on the ground that the debts to be paid are usurious. *Denn* v. *Dodds*, 1 *J. Cas.* 158.

6. A judgment in the hands of a *bona fide* assignee is, *it seems*, not affected by usury between the original parties. *Wardell* v. *Eden*, 2 *J. Cas.* 268. *S. C.* 1 *J. R.* 531, *note.*

7. A note given as collateral security for a judgment recovered, will not be affected by usury in the transaction upon which that judgment was obtained. *Stewart* v. *Eden*, 2 *Caines R.* 150.

8. The contract and security are void only as between the original parties, or where the suit is upon the very instrument infected with usury. *Jackson* v. *Henry*, 10 *J. R.* 185.

9. And where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defence of usury cannot be set up against such innocent person. *Ibid.*

10. So where a mortgage, containing a power of sale, has been given to secure a usurious debt, a vendee without notice under the power, will not be affected by usury. *Ibid.*

11. The mortgagor, if he would avail himself of the objection of usury, should have taken advantage of it before the sale; afterwards the purchaser has the better equity. *Ibid.*

12. Whether usury or not, is a question of fact for the jury to decide. *Smith* v. *Brush*, 8 *J. R.* 84.

13. Where A receives B's note, on giving B his note at *ten* days for the purpose of raising money on B's note; and pays B *two and a half per cent.* commission, this is a usurious loan, within the meaning of the statute. *Dunham* v. *Dey*, 13 *J. R.* 40. *S. C. in error*, 16 *J. R.* 367.

14. For it is a mere shift or contrivance to evade the statute. *Ibid.* Evidence of usage of trade to take a commission on such exchange of paper, is inadmissible, as usage cannot prevail where the transaction comes within the statute. *Ibid. S. C.* 16 *J. R.* 367.

15. *It seems*, that a person may lawfully reserve a commission for becoming security for another. *Ibid.*

16. *It seems*, that the practice of banks issuing *post notes* is not usurious. *Ibid.*

17. The plaintiffs, who were in the practice of receiving *produce* for the defendant, a country merchant, and freighting the same to the city of *New York*, and accepting his drafts under an engagement that the produce was to be in their warehouse at or before the time the drafts became payable, charged a *commission of two and a half per cent.* on all advances made by them to meet the payment of the drafts, when the defendant had no funds in their hands, and also the *interest* from the time the different items of their account became due; *held*, that the *commissions* in this case were not usurious, or a cover for a usurious transaction; but a customary allowance for the trouble and inconvenience of transacting the business. *Trotter and others* v. *Curtis*, 19 *J. R.* 160.

18. A note was drawn, payable to A and B, which was held by C, who wished to sell the note to D, who refused to take it, unless it was endorsed by A and B, and A refused to endorse it, unless he received security for his indemnification, which it was agreed to give,

and the note was sold to D at a discount of twenty per cent.; it being understood between B and C, that part of the money raised by the sale of the note, should be lent to B. B drew a note, payable to C or bearer, for the amount actually received by him from C, with an addition of twenty per cent. on the amount, and interest thereon from the date, which last mentioned note was deposited with A, as his security. In an action by A against B on this note, *held*, that it was usurious and void. *Yordan* v. *Hess*, 13 *J. R.* 492.

19. Where a mortgage is given as security on a usurious contract, with a power of sale, and the mortgagee, by virtue of the power, sells the land, pursuant to the *act concerning mortgages*, and becomes himself the purchaser, through an agent for that purpose, and in an action of ejectment brought by a purchaser of the equity of redemption against the mortgagee, the defendant sets up a title so acquired by sale under the mortgage; the plaintiff may prove *usury* in the mortgage, and recover, notwithstanding the mortgage. *Jackson ex. dem Sternbergh* v. *Dominick*, 14 *J. R.* 435.

20. The statute makes such sales a conclusive bar, only in favor of a *bona fide* purchaser, without notice; and the mortgagee, being a party to the usurious contract, is in no better situation than if no foreclosure had taken place. *Ibid.*

21. Where a bill or note is valid between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an endorsee who has discounted it, at a higher rate than the legal interest, and he may recover the full amount of the note against the maker or acceptor. *Munn* v. *The Commission Company*, 15 *J. R.* 44.

22. But the holder of a note purchased at a greater discount than the legal rate of interest, can recover from his endorser no more than he has actually paid for the note. *Ibid.*

23. If the parties whose names are on a note made to raise money, and discounted at a higher rate than the legal interest, could not, as between themselves, maintain an action on it when it became payable, if it had not been discounted, the transaction is usurious, and the note void. *Powell* v. *Waters*, 17 *J. R.* 176.

24. A bill or note drawn for the purpose of being discounted at a usurious rate of interest, and endorsed for the accommodation of the maker, is void in its original formation. *Munn* v. *The Commission Company*, 15 *J. R.* 44. *S. P. Bennett* v. *Smith*, 15 *J. R.* 355.

25. Discounting a note at *seven per cent.* is not usurious. *Manhattan Company* v. *Osgood*, 15 *J. R.* 162.

26. Where a note is given in renewal of a former note, and a *premium* or interest above *seven per cent.* is exacted for the renewal, the new note is usurious and void, although a separate note was given for the *premium;* but the old note is not thereby affected or destroyed. *Swartwout* v. *Payne*, 19 *J. R.* 294.

27. And where a note so made, in renewal of another note on a usurious consideration, was passed by the defendant to the plaintiff, in part payment of the consideration for the sale and conveyance of land; *held*, that the plaintiff who had sued the *endorser* of the note, and failed to recover because of the usury, might maintain *assumpsit* for the amount upon the original contract; the note being deemed a nullity. *Ibid.*

28. A mere change of securities for the same usurious loan, to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. *Tuthill* v. *Davis*, 20 *J. R.* 285.

29. As where a new note, without any new consideration, is given to take up a note in the hands of the original party to the usurious contract, it is tainted by the original consideration of the first note. *Ibid.*

30. A note made payable to A or bearer, but never delivered to A, but passed by the maker to H, as a security for a usurious loan, is usurious and illegal in its inception. *Marvin* v. *McCullum*, 20 *J. R.* 288.

31. The policy and utility of statutes against *usury* are discussed and defended by the chancellor in the case of *Thomson* v. *Berry*, 3 *J. C. R.* 395.

32. The rule for casting interest, when partial payments have been paid, is to apply the payment in the first instance to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus interest must not be added to the principal; but the interest continues on the former principal, until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and the interest afterwards computed on the balance of principal. *State of Connecticut* v. *Jackson*, 1 *J. C. R.* 13. *S. P. Stoughton* v. *Lynch*, 2 *J. C. R.* 209.

33. Whether the practice prevailing among merchants in settling their accounts, of stating an *interest account*, in which interest is charged on each item of principal on the debit side, and credited on each item of the credit side of the account, and a balance of interest

struck and added to the balance of principal, is to be adopted in the settlement of accounts between merchant and merchant? *Quere. Ibid.*

34. But where a master, under an order of reference, in stating the account between the parties, who were partners in trade, adopted such mercantile usage, the amount was allowed to stand, there being evidence before him, from the books of account or otherwise, that the parties themselves had followed that usage, and the calculation was so made by an eminent merchant, to whom the accounts were referred, with the consent of the parties, who did not question the statement before the master. *Ibid.*

35. To render a transaction usurious, there must be an unlawful or corrupt intention confessed or proved. *Nourse* v. *Prime*, 7 *J. C. R.* 69.

36. If, on an application for a loan of money, the sale of shares in an insurance company, *at par*, is made a condition of the loan when the shares are in fact below par, the transaction is usurious. *Eagleson* v. *Shotwell*, 1 *J. C. R.* 536.

37. And if it be impossible to ascertain the cash value of the shares, the company having failed, the sale will be rescinded, and the mortgage taken by the lender ordered to stand as security only for the cash lent and the interest thereon. *Ibid.*

38. So if, on a loan of money, the lender imposes on the borrower as a condition of the loan, property taken in part of the sum lent, at a higher value than it is worth, it is *usury*. *Stewart* v. *The Mechanics' Bank*, on appeal, 19 *J. R.* 496.

39. But where goods, or the notes of a bank, or of a third person, constitute part of the loan, and the value of the goods is uncertain, and the borrower, of his own accord, offers to take them at a certain price, or notes made by a person in credit, at par, *it seems* that the loan is not usurious. *Ibid.*

40. A lender is not allowed to make it the *condition* of the loan, that he shall receive a compensation for his services in procuring the money, as the allowing of such a demand would tend to usury and oppression, if it be not usury in itself. *Hine* v. *Handy*, 1 *J. C. R.* 63.

41. An injunction will not be granted against a judgment at law, on a charge of *usury*, where a party seeks a discovery of the usury and a return of the excess beyond the legal interest; for the usury would have been a good defence at law, and no reason was given why the defendant did not seek the discovery while the suit at law was pend-

ing. *Lansing* v. *Eddy*, 1 *J. C. R.* 49. [*And see Thompson* v. *Berry*, 3 *J. C. R.* 395. *S. C.* 17 *J. R.* 436.]

42. On a bill of discovery on a charge of usury, an injunction to stay proceedings at law on the contract will not be granted, unless the plaintiff tenders or brings into court the money actually lent and the lawful interest thereon. *Rogers* v. *Rathbone*, 1 *J. C. R.* 367. *S. P. Tupper* v. *Powell*, 2 *J. C.* 439. [*And see Fanning* v. *Dunham*, 5 *J. C. R.* 122.

43. Chancery will order a defendant to account for moneys overpaid to him, beyond the legal interest, pursuant to an usurious contract. *Dey* v. *Dunham*, 1 *J. C. R.* 182.

44. Where the defendant advanced his notes to the plaintiff, for the plaintiff's notes for the same sums, payable at or near the same periods, for which exchange of notes the defendant received a commission of two and a half per cent. on the amount; and the notes, when they became due, were renewed, and new notes given in exchange, and this renewal and exchange were many times repeated, and the defendant, on each renewal and exchange, received a commission of two and a half per cent., but which was less than the lawful interest on the amount of the notes for each time they had to run: *Held*, that the transaction was not usurious, it being a compensation only for a loan of credit and risk. *Ibid.*

45. But where D lent F his promissory notes, and received the notes of F for the same amount in exchange, and also a commission of two and a half per cent., which exceeded the legal interest for the time the notes had to run: *Held*, that the transaction was usurious, and the notes and other securities given by F void. *Fanning* v. *Dunham*, 5 *J. C. R.* 122. [*And see Dunham* v. *Gould, in error*, 16 *J. R.* 367.]

46. The charge of a *commission* of a *half per cent.* by a stock and exchange broker, in addition to the lawful interest on advances made on a deposit of stocks, as a compensation for transacting the business, is not usurious. *Nourse* v. *Prime*, 7 *J. C. R.* 69.

47. Where the plaintiff was sued at law upon notes alleged by him to be usurious, and suffered a verdict and judgment to be taken against him, without making any defence, or applying to chancery for a bill of discovery: *Held*, that he was concluded, and not entitled to relief in this court. *Thompson* v. *Berry*, 3 *J. C. R.* 395. *S. C. on appeal*, 17 *J. R.* 436. [*And see Lansing* v. *Eddy*, 1 *J. C. R.* 49.]

48. An assignment of a debt, usurious in its inception, to a third

person, who has knowledge of the original transaction, will not cover it from the scrutiny of the court. *Ibid.* And sufficient ground appearing to support the charge of usury, a reference to a master to take an account, &c., was ordered. *Ibid.*

49. If the lender of money on an usurious contract seeks to enforce his securities in chancery, and the borrower sets up usury as a defence, and proves it, the securities will be declared void, and ordered to be delivered up and cancelled. *Fanning* v. *Dunham*, 5 *J. C. R.* 122.

50. But where the lender has proceeded at law, and recovered judgment on a bond and warrant of attorney, or is proceeding to foreclose a mortgage by virtue of a power of sale under the statute, without the aid of the court, and the borrower files his bill for relief against the judgment or other legal securities, on the ground of usury, he must, before he can be entitled to relief, pay, or offer to pay, the principal and interest lawfully due; and that whether the usury be established by proof or be admitted in the defendant's answer. *Ibid.*

51. History of the practice of courts of law, in interfering to set aside judgment by confession on bonds and warrants of attorney, on the ground of usury. *Ibid.*

52. Where a party to a judgment entered up, on a warrant of attorney, voluntarily waives his defence on the ground of usury or fraud, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the transaction between the original parties. *French* v. *Shotwell*, 5 *J. C. R.* 555.

53. As, where a party against whom a judgment had been entered up, on a bond and warrant of attorney, founded on an usurious consideration, filed a bill for relief against the judgment on the ground of usury, and afterwards voluntarily dismissed the bill, with costs: *Held*, that a subsequent purchaser of the land on which the judgment was a *lien*, could not impeach it on the ground of usury or fraud. *Ibid.*

54. The act for the prevention of usury (Sess. 10, c. 13) contains no *limitation* to a suit at the instance of the party aggrieved, to compel the lender to discover and refund the usurious excess of interest paid: *provided* no *qui tam* or popular action has been commenced by a third person under the act, previous to filing the plaintiff's bill. *Palmer* v. *Lord*, 6 *J. C. R.* 95.

55. A plea, therefore, in bar of the suit, that the plaintiff did not file his bill within *one year* after the usurious interest was paid, is bad. *Ibid.*

56. Before the statute, the party aggrieved had a right of action at

common law, to recover back the *surplus* beyond the principal and legal interest. The *second* section of the statute, therefore, does not give a new right of action, though it omits the penalties and forfeitures contained in the *English* statute. *Ibid.*

57. The right of the party aggrieved to bring the action after one year, may be lost by the interposition of the *popular* action given by the statute; but until such popular action has been commenced, and a right has attached in a third person, *it seems*, that the party aggrieved may bring his action, and his right to the *surplus* of interest paid will be thereby fixed, so that a popular action brought afterwards cannot be sustained, though within the *second* year; and if no such popular action is brought within the second year, the right of action continues in the party aggrieved, subject only to the general limitations of actions at law. *Ibid.*

58. Judgment by confession on bond and warrant set aside for usury, the usury being sworn to by the defendant, and not directly and positively denied by the plaintiff. *Lansing* v. *McKellup*, 1 *Cow.* 35.

59. Whether a bond to pay compound interest upon a debt is usurious? *Quere. Ibid.*

60. The cases of practice, in relation to setting aside judgments for usury, referred to. *Ibid.*

61. The rule is this: taking interest in advance is allowed for the benefit of trade, though it exceed the legal rate of interest. The instrument thus discounted must be such as will, and usually does, circulate in the course of trade, viz., a negotiable instrument, and payable at no very distant day. Under this restriction, taking interest in advance, either by a bank or incorporated company without banking powers, or an individual, is not usurious. *The New York Firemen's Ins. Comp.* v. *Ely & Parsons*, 2 *Cow.* 678.

62. A usage among banks to cast interest at a year for three hundred and sixty days; one half a year for one hundred and eighty days; one quarter of a year for ninety days; one sixth of a year for sixty days; and the three days of grace at one tenth of a month, would not prevent its being usurious, though such usage were universal. *Ibid.*

63. The legal year is three hundred and sixty-five days; the legal half year is one hundred and eighty-two days; and the legal quarter ninety-one days; the law paying no regard to the odd hours. *Ibid.*

64. A statute cannot be abrogated or controlled by the custom or usage of a particular trade. *Ibid.*

65. To constitute usury, there must be a corrupt agreement. *Ibid.*

66. Payment and receipt of usurious interest is *prima facie* evidence of a corrupt agreement. *Ibid.*

67. This may be repelled by showing that it was by mistake. Examples of mistake, miscast, miscount of money, &c. *Ibid.*

68. But the adoption of an erroneous principle of calculation, which gives more than seven per cent. per annum, and receiving the discount or interest according to that principle, is usury, though the lender believe he has a legal right to do so. *Ibid.*

69. The former is a mistake of the fact, the latter of the law. *Ibid.*

70. An agreement to pay more than legal interest, through ignorance of the law, is void. *Ibid.*

71. Whether there be a corrupt agreement, so as to constitute usury, is a question of fact; but when the facts are proved beyond dispute, the law fixes the intent. *Ibid.*

72. This distinction considered and illustrated. *Ibid.*

73. Three things necessary to constitute usury: a loan, taking more than legal interest, and a corrupt agreement. *Bank of Utica* v. *Wager*, 2 *Cow.* 712.

74. Taking the interest in advance, on discounting a note, is not usury; though it was formerly *held* otherwise. *Ibid.*

75. But, *it seems*, this is confined to bankers, and those who deal in commercial paper by way of trade. *Ibid.*

76. The cases upon the two last points considered. *Ibid.*

77. A bank, having established certain days for discounting notes, discounts a note at ninety days, taking the interest in advance. At the discount day, nearest the day when the note falls due, but previous to the latter, the note is renewed, the interest being again taken in advance; and the note is renewed the same way a third time; so that for part of the time for which the note runs, interest is taken at the rate of fourteen per cent. per annum, owing to a lapse of the note. This is not usury, unless there was an agreement upon the first loan, either expressed or implied, that the note should be thus renewed, or it otherwise appears that the transaction was a cover for usury. *Ibid.*

78. In taking interest in advance, on discounting a note, it is lawful to include the three days of grace in the computation. *Ibid.*

79. To every practical purpose, the days of grace are a part of a promissory note. *Ibid.*

80. But to take interest in advance, on discounting a ninety-day note, calculated at a quarter of a year for ninety days, is usurious, and the note is void. *Ibid.*

81. Receiving usurious interest intentionally, is sufficient evidence of a corrupt agreement. *Ibid.*

82. The policy of the statute of usury vindicated. *Ibid.*

83. Custom or usage will not be received to sanction usury. *Ibid.*

84. S. P. as to usury, custom, discount, &c. *Bank of Utica* v. *Smalley*, 2 *Cow.* 770.

85. Discounting a note at seven per cent., and taking the interest in advance, is not usury, either in bankers or others. *New York Firemen's Ins. Comp.* v. *Sturges*, 2 *Cow.* 664.

86. Where a trifling excess is taken, on discounting a note, beyond the legal interest, it will be presumed to be by mistake, and not by the adoption of an erroneous rule of calculation, until the latter is shown. *Ibid.*

87. Taking beyond the legal interest by mistake is not usurious. *Ibid.*

88. Though, *it seems*, it would be otherwise where the excess arises from the voluntary adoption of an erroneous rule of calculation. *Ibid.*

89. Casting interest on the principle that thirty days are the twelfth of a year, sixty days the sixth, ninety days the fourth of a year, and the three days of grace the tenth of a month, and discounting a note upon such calculation, is usurious, and the note consequently void. *New York Firemen's Ins. Comp.* v. *Ely*, 2 *Cow.* 678.

90. The right to take interest in advance, on discounting a note, is not confined to banks, bankers, and merchants discounting bills in the fair course of commercial business, but extends to individuals and others having a general right to discount. *Ibid.*

91. A bond, dated July 26th, 1815, with condition to pay $3,000, with interest, as follows: $500, with interest on the whole sum unpaid from the 1st of October, 1815, on or before the 1st of October, 1816; and $500 more thereof, with interest on the whole sum unpaid from the 1st of October next, on or before the 1st of October, 1817; the residue expressed to be payable in instalments of $500, yearly, in like manner. *Held*, not usurious on the face of the condition, though upon one construction, every instalment would draw interest from the 1st of October, 1815, notwithstanding it might have been previously paid; and thus the second instalment might draw fourteen per cent. interest, the third twenty-one per cent., and so in that progression to the last; but, to avoid this consequence, *held*, that the words "with interest on the whole sum unpaid" should rather be deemed to refer to the interest as well as the principal, and to mean that $500 was payable on the 1st of October, 1817, together with the interest that accrued on the

balance of principal subsequent to the 1st of October, 1815, and remained unpaid. *Archibald* v. *Thomas*, 3 *Cow.* 284.

92. Where a contract admits of two significations, that should be adopted which renders it operative, rather than that which renders it void. *Ibid.*

93. If a contract is susceptible of two constructions, one of which will bring it within, and the other without the statute of usury, the latter construction should be adopted. *Ibid.*

94. A contract reserving more than legal interest on its face, is *prima facie* evidence of a corrupt agreement, which is the foundation of usury; but this may be repelled by showing that more than legal interest was reserved by mistake, *e. g.* a mistake of the scrivener in wording the bond, whether such mistake be of the fact or of the law. *Ibid.*

95. The court have the exclusive power of deciding whether a contract be usurious on its face. *Ibid.*

96. A contract to pay interest generally, means the legal standard of interest. *Ibid.*

97. M requested J to procure a loan of money for the former; stipulating to pay J three per cent. per month: J accordingly borrowed the money of W. M gave his promissory note, with an endorser. M paid J the three per cent. for his sole benefit. *Held*, that the note was not usurious. *Coster* v. *Dilworth*, 8 *Cow.* 299.

98. To take interest in advance, upon discounting a ninety-day note, made to be discounted, the interest being calculated at one fourth of a year for the ninety days, is usurious, and the note therefore void. *Bank of Utica* v. *Wager*, 8 *Cow.* 398.

99. Giving and receiving designedly more than legal interest is, without any express corrupt agreement, usury. Per *Colden*, Senator. *Powells* v. *Waters*, 8 *Cow.* 669.

100. Selling cows, &c., on a contract to return double the same number and description at the end of four years, is not usurious. *Spencer* v. *Tilden*, 5 *Cow.* 144.

101. So of sheep, to double in three years. *Holmes* v. *Wetmore*, 5 *Cow.* 149.

102. When the sale of an article, which is of fluctuating value, to be repaid in kind, with more than the legal rate of interest for forbearance on the price at the time of sale, shall be deemed usury. *Hamlin* v. *Fitch*. *Kirb. Conn. Rep.* 260; substance of the case given in note (a). 5 *Cow.* 149.

103, Of the evidence necessary to make out usury. *Jackson* v. *Smith*, 7 *Cow.* 717.

104. The lender stating that he had made a usurious loan to the borrower in one year, at a certain rate, and on certain security, and that such were his usual terms, will not authorize a jury to presume that a loan in the next year to the same borrower for a different sum, on the same kind of security, was usurious; or that a security taken in the same form the next year, for a different sum, was a renewal of the former security, or in any manner connected. *Ibid.*

105. The general character or habit of a usurer is not a foundation for presuming usury in a particular loan. *Ibid.*

106. One who contracts to buy land of another, and enters under such contract, is, in ejectment, estopped to show title out of the vendor. *Ibid.*

107. But, *semble*, he may do so, if the contract be usurious. *Ibid.*

108. An agreement to pay more than legal interest for money loaned on note, such agreement being made at the time of the loan, is usurious, and renders the note void, though the note on its face be for the mere amount lent with legal interest only. *Merrills* v. *Law*, 9 *Cow.* 65.

109. But if the agreement to pay more than legal interest be subsequent to the time of the loan, though such agreement be usurious, yet it will not avoid the note. *Ibid.*

110. Where R was applied to by P for a loan of money, but not having it, referred P to his son-in-law, whose usage he said it was to receive seven per cent. besides legal interest, and by an arrangement between himself and P, received P's note with an endorser, and procured the money of his son-in-law at the rate mentioned by him, on his own note which he afterwards paid, and gave P credit from time to time on P's successive endorsed notes, holden by R himself; *held*, that R must be considered the lender, that he did not stand in the light of a mere surety of P, and that the note taken by him was void. *Reed* v. *Smith*, 9 *Cow.* 647.

111. Where the original loan is usurious, all the securities therefor, however remote or often renewed, are void. *Ibid.*

112. Where one as agent lends money for another, at a usurious rate of interest, and afterwards pays him, and takes security of the borrower in his own name, it is void, though he derive no benefit from the loan, and the premium go to the exclusive benefit of the principal. *Ibid.*

113. It would be void even in the hands of a *bona fide* holder. *Ibid.*

114. Whether a surety, knowingly becoming bound for and paying a usurious loan, may recover over against his principal? *Quere Ibid.*

115. A note given on the settlement of an account, in which compound interest is charged, is not usurious. *Kellogg* v. *Hickok*, 1 *Wend.* 521.

116. Interest calculated and received upon a note, upon the principle of three hundred and sixty days being a year, is *prima facie* usurious, and renders the note void. *Utica Insurance Company* v. *Tillman*, 1 *Wend.* 555.

117. Where A and B exchanged notes, for the purpose of raising money, and A obtains the note of B, to be discounted at a premium exceeding the lawful rate of interest, such transaction is not usurious, and cannot be set up in bar of a recovery in an action by the purchaser of the note against B the maker. *Rice* v. *Mather*, 3 *Wend.* 62.

118. Interest taken in advance by a banking institution on discounting a note, is not usury. *Bank of Utica* v. *Phillips*, 3 *Wend.* 408.

119. If a company not possessing banking powers take interest in advance on discounting a note, this does not render the loan usurious. *Utica Ins. Comp.* v. *Bloodgood*, 4 *Wend.* 652.

120. The letting of a two-year-old heifer and calf, the heifer to be returned at the end of four years, with another heifer three years old, is not usurious. *Cummings* v. *Williams*, 4 *Wend.* 679.

121. A note reserving usurious interest is void, though given for a pre-existing valid debt; such debt, however, may be recovered, notwithstanding the invalidity of the security. But where the agreement between parties is usurious, (though such agreement be founded on a good consideration,) it is void. *Rice* v. *Welling et al.* 5 *Wend.* 595.

122. A mortgage taken on a loan of money, including a former usurious loan, is void; the taint of *usury* destroys the *whole security*. *Jackson* v. *Packard*, 6 *Wend.* 415.

123. Where a *usurious note* has been transferred for a valuable consideration and without notice, and a new note taken by the holder, the *usury* of the first note cannot be set up in bar of a recovery on the second note. *Kent* v. *Walton*, 7 *Wend.* 256.

124. Discounting a *business note* at more than seven per cent.

interest, is not a usurious transaction; a note, valid in its inception, may be bought and sold as a chattel, at its value, real or supposed. *Ibid.*

125. A promissory note for the payment of a particular sum with interest from a day anterior to the date of the note, in itself affords no evidence of usury. *Marvin* v. *Feeter*, 8 *Wend.* 533.

126. Nor is it usurious, on selling a note payable at a future day, to take a note for the principal and interest of the note sold, computed to the day of sale, without making a rebate of interest. *Ibid.*

127. A loan company authorized by its charter to loan money on pledges of goods and chattels, and to charge interest for a full month where the loan is for a period over fifteen days and less than one month, is not entitled, where a loan for twenty days remains unpaid, to demand interest at the same rate for any subsequent time; the interest on the debt due at the expiration of the twenty days, must be computed as on ordinary contracts. *Macomber* v. *Dunham*, 8 *Wend.* 550.

128. Where, after the expiration of twenty days, interest was charged for a subsequent period at the same rate, and a promise for the payment thereof exacted and made, at the same time that a bond was taken for the sum actually lent; *it was held*, that the interest thus computed was usurious, and that the agreement for the payment thereof, though not included in the bond, rendered it void for usury. *Ibid.*

129. In an action by the endorsee of a promissory note against the maker, usury may be set up as a defence, unless it be shown that the plaintiff is an innocent holder, for a valuable consideration, and became possessed of the note before maturity. *Hackley* v. *Sprague*, 10 *Wend.* 113.

130. The maker of a note is not precluded from setting up the defence of usury against the endorsee, if the note was made and became payable previous to January 1st, 1830, although transferred after the Revised Statutes went into effect, and for a valuable consideration. *Ibid.*

131. The including of one per cent. in a promissory note, as the difference in the rate of exchange between the place where the payee of a promissory note resides and the place of payment, is not *per se* evidence of usury, where the note is thus made payable for the accommodation of the maker. *Merrill* v *Benton*, 10 *Wend.* 116.

132. The eighth section of the act relative to usury, (dispensing with the payment or offer to pay interest, on the filing of a bill in chancery, for a discovery of the money, &c., received in violation of

the provisions of the act,) does not abrogate the established principle of a court of equity, that on filing a bill of discovery on an allegation of usury, the complainant must pay the principal or the sum actually lent; and a bill of discovery not containing such offer is bad on its face, and may be demurred to. *Livingston* v. *Harris*, 11 *Wend.* 329.

133. The provision in the same section, forbidding a court of equity to require or compel the payment or deposit of the principal sum as a condition of granting relief, applies only to cases where the complainant, although he can prove the usury without resort to the oath of the lender, has no opportunity of setting up the defence, in consequence of the nature of the securities executed by him; as, for instance, a judgment entered on bond and warrant, or a mortgage with power to foreclose under the statute. *Ibid.*

134. A surety, *it seems*, is a borrower within the meaning of the statute, and is entitled to avail himself of its provisions. *Ibid.*

135. Where a usurious security is given in part for a *pre-existing valid debt*, such debt is not destroyed by the illegal security. But, although a usurious contract contains a good consideration in fact, as where money is actually lent and received by the borrower, yet the security being absolutely void, no action can be maintained upon it, nor is it evidence of indebtedness, upon the strength of which the law will *imply* a promise on the part of the borrower to pay the amount actually received by him. *Hammond* v. *Hopping*, 13 *Wend.* 505.

136. If, however, the contract be mutually abandoned, and the securities are cancelled or destroyed, so that they can never be made the foundation of an action, and the borrower *subsequently promises* to pay *the amount actually received* by him, such promise is *legal and binding*. *Ibid.*

137. Where there is a usurious agreement upon the loan of money, it is immaterial whether the unlawful excess be *actually paid*, or only *promised to be paid*; in either case the contract is void. *Ibid.*

138. Where the pleadings give notice to a party to be prepared to produce a particular instrument at the trial, formal notice is not necessary. *Ibid.*

139. Where goods, fraudulently obtained, are deposited with an auctioneer, who makes an advance upon them, and charges five per cent., besides the usual commissions, the transaction is usurious; and for that cause the auctioneer is not entitled to be considered as a *bona fide* purchaser, in an action of trover brought against him by the

party from whom the goods were obtained, although he is wholly innocent of the fraud. *Ramsdell & Brown* v. *Morgan*, 16 *Wend.* 574.

140. A contract is not usurious, whereby one lets a certain number of sheep, and the other agrees on a year's notice to return the same number of sheep of the same quality and age as those received, and in the mean time to pay annually fifty cents per head for each sheep, although the value of the sheep per head is less than a principal sum, the interest of which, at seven per cent. per annum, would amount to fifty cents. Such a contract is not usurious, if it depends upon *contingencies* whether, on the return of the property, the lender will have received more than the *value of the property* at the time of the making of the contract and the interest thereof at the ordinary rate.

It seems, that in suits or contracts of this kind, the question whether the contract was a device or shift to evade the statute of usury, should be submitted to a jury. *Hall* v. *Haggard & Reynolds* 17 *Wend.* 280.

141. Where the defence to an action is usury, and the plea hath been duly verified, so as to entitle the defendant to the right to examine the plaintiff as a witness, the defendant, *it seems*, may claim the *personal attendance* of the plaintiff, where the latter is a non-resident of the state, and is not bound to accept a commission to take his testimony, the court in bank will not however make any order in the matter, the proper course being to apply to the circuit judge to put off the trial, in case the plaintiff does not attend, after receiving notice to that effect. *Bosworth* v. *Perhamus*, 20 *Wend.* 611.

142. Where the holder of a note, payable to himself, requested another person to procure the note to be discounted, who, by placing his name upon it, as an endorser, procured it to be done, received the avails and paid over the same, except the sum of thirty dollars, which he retained for his endorsement and trouble in the matter; it was held that the transaction was usurious, and that the usury might be alleged in bar of a recovery of a subsequently substituted note. *Steele* v. *Whipple*, 21 *Wend.* 103.

143. The transfer and guaranty of a note for a larger sum, in consideration of a less sum, is not *per se* usurious; the guarantor in such case, when called on for payment, being liable only to refund the amount received by him with the interest thereof. *Mazuzan* v. *Mead*, 21 *Wend.* 285.

144. On a defence of usury, where there is a verdict for the plaintiff, and there is any room for doubt as to the truth of the defence, a

new trial will not be granted. Although the court, sitting as jurors, would have found for the defendant. *Mansfield* v. *Wheeler*, 23 *Wend.* 79.

145. Where an acceptance is given in consideration of a promise, that the party obtaining the acceptance will, at a specified period, deliver to the acceptor a quantity of country produce, the acceptor cannot avail himself of the defence of usury, if the acceptance be subsequently and before maturity negotiated by the holder at a usurious rate of interest. *Cameron* v. *Campbell*, 24 *Wend.* 94.

146. A mortgage taken on the loan of $700, to be paid in ten years, with interest, (the interest not to be paid until the expiration of the ten years,) is not usurious, though the loan be made upon an agreement, that the mortgagee, in addition to the interest reserved, shall have, free of rent, the use and occupation of an acre of the mortgaged premises, worth eight dollars per year, the whole compensation for the loan not being equal to a reservation of *compound interest*. *Fox* v. *Lipe*, 24 *Wend.* 164.

147. Where a usurious loan is made, and promissory notes pledged as security for the repayment of the money, an action upon the notes cannot be maintained by the lender against the borrower. *Bell* v. *Lent*, 24 *Wend.* 230.

148. Nor can an action be maintained by a third person who has received the notes from the lender under an agreement to collect them, and apply the proceeds towards payment of a debt due to him from the lender. *Ibid.*

149. Where a note had been transferred by the payee, and an action was brought upon it by the holder against the maker, the payee, called as a witness by the maker, was held to be privileged from answering questions put to him for the purpose of showing any agreement respecting the note, or the consideration thereof, or any payment thereupon to him, the defendant having avowed that his defence was usury, and that usurious interest had been reserved by the payee, as the tendency of the answer might be to subject himself either to a penalty or to an indictment for a misdemeanor. *Burns* v. *Kempball*, 24 *Wend.* 360.

150. The giving of a certificate of deposite, payable at a future day, does not render a bill of exchange discounted by a bank void for usury, where the certificate was granted at the request and for the accommodation of the party obtaining the discount, and there is no intent to take usury. *Knox* v. *Good*, 25 *Wend.* 643.

151. A party who buys an accommodation note before it has

been used for any business purpose, stands in the same situation as respects the defence of usury, as if he were the payee named in the note, and this, though he took the note supposing it to be business paper. *Aeby* v. *Rapelje et al.* 1 *Hill*, 9.

152. Such a party is not entitled to be protected as an endorsee or holder in good faith. *Ibid.*

153. M, having a large debt against one who had assigned his estate in trust for creditors, applied to the assignees for a loan of $12,000 from the trust fund, until a dividend should be made; whereupon the latter let him have notes belonging to the estate, which, estimating them at their nominal value, amounted to $8,254 69, besides cash to the amount of $3,745 31, and took therefor M's note for $12,000, with interest. *Held*, that though there was evidence tending to show the notes which M received to have been worth at the time considerably less than he allowed for them, the transaction was not necessarily usurious, but depended upon the intent with which the loan was made. *Sizer* v. *Miller et al.* 1 *Hill*, 227.

154. *Held*, further, that a report of referees, stating that they had examined the evidence, and were of opinion, as *matter of law*, that the transaction was usurious, implied that they had not passed upon the question as one of intent, and was therefore erroneous.

Cowen dissented, holding that the report did not necessarily import this, but was equivocal, and there being evidence from which it might be sustained as a general report in favor of the defendants, the court ought not to interfere.

155. *It seems* it is not admissible in such cases, by way of rebutting the usurious intent, to inquire of the party who made the loan *whether there was any intention, shift or device on his part to get more than seven per cent., &c.*, for that is calling upon him to pronounce broadly the point in dispute. *Ibid.*

156. Though a note is prosecuted in the name of a mere nominal holder, the defendant cannot examine the *party in interest* to prove it usurious without his consent; for the act of May 15th, 1837, only gives this right as against the *plaintiff on the record*. *Bank of Salina* v. *Henry imp. Pierce*, 1 *Hill*, 555.

157. Proof that a note was usurious in its inception, is sufficient even as against an endorsee, and under 1 *R. S.* 772 *et seq.* to cast upon him the onus that he paid a valuable consideration for it. *Layman* v. *Strong*, 1 *Hill*, 563.

158. *Quere*, whether having shown this, he may rely on the date of the endorsement, and the fact of subsequent possession as *prima*

facie evidence of the other requisites necessary for his protection within sec. 5 of the above statute. *Ibid.*

159. Though the statute in general terms declares void all contracts and securities affected with usury, yet several exceptions have been allowed to its provisions in favor of innocent third parties.

160. Various cases recognizing the exceptions cited and commented upon.

161. Contracts affected by usury are not so utterly void but that they may be ratified.

162. A deed or contract cannot be avoided for usury by a mere stranger to the transaction; but only by the party who made it, or some one standing in legal privity with him.

163. A judgment creditor, by selling the property of his debtor on execution, may thus place himself in a situation to contest the validity of any prior lien or incumbrance affected by usury.

164. Accordingly, in replevin against the sheriff for goods taken on execution, where the plaintiff claimed under a prior mortgage executed by the judgment creditor: *Held*, that the sheriff might show the mortgage usurious, as a defence to the action.

165. A purchaser under a judgment and execution being an assignee of the debtor by operation of law, may set up usury as against one claiming the property in virtue of a prior incumbrance.

166. In an action by a country bank against the endorser of a bill of exchange, mentioning no place of payment, it appeared that the bill was discounted by the plaintiff for the acceptors—that the drawer, acceptors, and endorser, resided in New York—that the business was conducted by the plaintiffs through their cashier while in that city—that the avails of the bill were paid in drafts on New York, equal in value to city funds; and that the amount thus paid was the face of the bill, deducting the difference of exchange between country and city funds, in addition to the usual discount: *Held*, that the bill was not usurious. *Cayuga County Bank* v. *Hunt*, 2 *Hill*, 635.

167. Otherwise, had more than the usual difference of exchange been deducted, or the avails of the bill been paid in drafts having a long time to run. *Ibid.*

168. The notice of defence of usury required to be given by the act of May 15, 1837, in order to entitle the defendant to the testimony of the plaintiff, can only be *interposed* as in other cases with the general issue. *Per Nelson J.*, *Clyer* v. *Theyer*, 3 *Hill*, 564.

169. Such notice should contain the substantial requisites of a plea,

viz., a precise statement of the usurious contract, and the amount of the usurious interest reserved.

170. Where, in an action on a promissory note, the defendant gave notice in general terms that he would prove the note to have been given for money loaned upon a usurious consideration; *held*, that the notice was defective, and that the plaintiff was not obliged to testify. *Ibid.*

171. Where a defendant interposes a plea or notice of usury, and verifies the same, pursuant to the act of May 15, 1837, he may call and examine the plaintiff without obtaining an order for that purpose. *Millers* v. *McCagg*, 4 *Hill*, 35.

172. The only mode of procuring the attendance of the plaintiff for the purpose of examining him as a witness, pursuant to the act of May 15, 1837, is by serving him with a subpœna in due season, and paying or tendering him the fees of a witness. He is not bound to regard a mere notice to attend. *Rapelje & Purdy* v. *Prince*, 4 *Hill*, 119.

173. S, a commission merchant in the city of New York, agreed to accept drafts of N, to the amount of $20,000, taking a bond and mortgage from him for twice that sum as security; and it was further agreed that all produce shipped to New York by N, should be sent to S for sale on commission—that the latter should thus be kept in funds to meet his acceptances as they became due, and that he should be entitled to two and a half per cent. commission on all advances or acceptances met otherwise than with produce. N's drafts were afterwards accepted and paid by S, to an amount exceeding the value of the produce consigned; and he charged N with interest on all sums thus paid, together with two and a half per cent. commissions on acceptances not met with produce. *Held*, in an action by S to recover the sum advanced upon one of the drafts, that the transaction was not necessarily usurious; especially as it appeared that the charge for commission was customary among merchants engaged in similar business. *Cowen J.* dissenting, whose opinion on usurious loans of credit, see. *Suydam* v. *Westfall*, 4 *Hill*, 211.

174. The *bona fide* sale of one's credit by way of guaranty or endorsement, though for a compensation exceeding the lawful rate of interest, is not usurious, if the transaction be unconnected with a loan between the parties. *Ketchum* v. *Barker*, 4 *Hill*, 224.

175. In such case it is a general question for the jury whether the excess, by whatever name it be called, was really taken as a compensation for trouble and expense incurred in good faith, or was mere usury in disguise. *Per Nelson, C. J. Ibid.*

176. M, being desirous of raising money by a note at four months, drawn by himself and endorsed for his accommodation by B and L, authorized a broker to buy an additional name or guaranty for the purpose of getting the note discounted. Application was accordingly made to K, also a broker, who endorsed the note on receiving a commission of two and a half per cent., and it was then discounted at a bank. About the time it fell due, M made another note, corresponding in amount, which after being endorsed, was discounted by K, and the proceeds applied in payment of the first. The second note not being met at maturity, K brought an action upon it against the makers and endorsers, which was referred, and the referee reported in K's favor. *Held*, on motion to set aside the report, that the taking of the commission by K, did not render the transaction *per se* usurious, and the motion was therefore denied. *Ibid.*

Cowen dissenting, holding that the transaction between K and M, in respect to the first note, was not a *sale* in any sense, but amounted to a usurious loan of K's credit; and the note in question having come to his hands by way of further security or extension of the loan, was void. Various English and American cases reviewed.

177. C covenanted to assign a bank bonds and mortgages on real estate to the amount of $13,000, payable in five years with interest semi-annually, and to guaranty the payment of them; in consideration whereof the bank agreed to transfer to C certain stock to the amount of $6,500, at its nominal value, but which was then twenty-five per cent. below par, and to pay him the balance in money. Afterwards, the bonds and mortgages not having been assigned, the bank transferred the stock and paid the money on receiving two notes for $6,500, agreeing to take the bonds and mortgages in payment if delivered before the notes became due. *Held*, in an action upon one of the notes, that the transaction was usurious; and a verdict finding it otherwise, was set aside. *Seymour et al.* v. *Strong*, 4 *Hill*, 255.

178. A bond and mortgage for $3,000, payable one year from date with interest, to become due half yearly, and on which over five months interest had already accrued, were absolutely assigned by the holder for $2,600 in order to raise money. The assignment stated the consideration paid by the assignee to be $3,000, and contained a covenant that thus much was due and owing on the bond and mortgage. At the time of executing the assignment, the assignor also executed to the assignee a bond with surety, conditioned that the mortgagor should pay the $3,000, together with the interest, by the day appointed for that purpose in the securities assigned. On a bill filed by the assignor

to set aside the assignment, and have the bond of guaranty cancelled: *Held*, that the transaction was on its face a mere sale of a chose in action unconnected with a loan, and therefore not usurious *per se*. *Rapelje* v. *Anderson*, 4 *Hill*, 472.

Cowen dissenting, being of opinion that the transaction was, in effect, a usurious loan, and that the complainant was therefore entitled to the relief sought.

179. In an action on the bond of guaranty, the assignee's recovery would be limited to the actual amount paid for the bond and mortgage, notwithstanding the consideration expressed in the assignment. *Senator Franklin*, *Ibid.*

180. The second section of the act to prevent usury (sess. 37, page 487) was intended to give the defendant a right to insist on a personal examination of the plaintiff at the trial; and the latter ought not to be allowed, by absenting himself from the state, to compel the defendant to resort to a commission. *Per Cowen*, *Vermilyea* v. *Ryers*, 4 *Hill*, 567.

181. Whether a commission may issue for the purpose of examining the plaintiff in such case? *Quere. Ibid.*

182. Where the plaintiff was temporarily absent from the state, so that he could not be served with a subpœna, and neglected to attend the circuit at which the cause was set down for trial, notwithstanding a notice to his attorney, requiring such attendance: *Held*, that the circuit judge might, in his discretion, make a general order postponing the trial till the plaintiff should appear, especially as there was reason to suspect he remained absent with a view of evading a personal examination. *Bronson* dissenting. *Ibid.*

183. Where R, a resident of the state of NewYork, applied to C, at his residence in England, for a loan of money upon the security of a bond and mortgage upon lands in New York, at the legal rate of interest in that state, and it was there agreed that, upon the return of R to New York, he should execute his bond and mortgage, and have the mortgage duly recorded in the county where the land was situate, and that upon the receipt of the bond and mortgage by C, in England, he should deposite the money loaned with the bankers of R in London, for his use; and the bond and mortgage were executed and the money received accordingly: *Held*, that the mortgage was a valid security for the loan, according to the laws of New York, and that, upon a bill filed there to foreclose the mortgage, R could not set up the usury law of England as a defence to the suit.

184. Where a mere personal security is given for the payment of

a loan of money, and no place of payment is specified therein, the residence of the lender at the time of giving such security must be considered as the place of payment, for the purpose of deciding the question whether such security is invalid on the ground of usury.

185. But it seems that a loan of money made upon personal security, at the rate of interest allowed by the law of the place where the loan was made and the security given, although made payable to the lender at his place of residence, where the legal rate of interest was less, would not be a violation of the usury laws of the latter place, unless intended as a mere cover for the usury. *Chapman* v. *Robertson*, 6 *Paige*, 627.

186. Where W, who resided at Glen's Falls, was indebted to H & M, of the city of New York, and upon application to W, at the place of his residence, for payment of the debt, it was agreed between him and H & M that they should give to him three months for the payment of one half of the debt, and four months for the payment of the other half, upon his securing the debt by bond and mortgage; and that he should, in addition to the legal interest, allow them interest for fifteen days, for the time they estimated that it would take them to obtain the money in the city of New York after it was paid, and the further sum of $20 for the travelling expenses of one of the creditors, who had come to Glen's Falls to secure the payment of the debt, which $20 and the additional allowance for the fifteen days' extra interest were included in the bond and mortgage: *Held*, that the bond and mortgage were usurious and void, although the debtor voluntarily agreed to pay the half of the expenses of coming to his residence from the city of New York to collect or secure the debt. *Williams* v. *Hance*, 7 *Paige*, 581.

187. Where no place of payment is specified in the bond and mortgage, the debt is payable at the residence of the mortgagee, or to the mortgagee generally wherever he may he found. But if a debtor, in consideration that the mortgagees will make the mortgage payable at the residence of the mortgagor, instead of the residence of the mortgagees, agrees to allow them the difference of exchange between the two places, the contract will not for that reason be invalid, unless such arrangement was a mere device on the part of the mortgagees to evade the usury laws, and to obtain more than legal interest for the use of their money. *Ibid.*

188. Where a person applied to another to assist him in obtaining the loan of $400, and promised to give him $28 for procuring the loan, investigating the title and drawing the bond and mortgage there-

for, and putting them on record, and the latter applied to his own father for a loan of the money for a year, at seven per cent., and agreed that the title should be investigated and the securities made and put upon record without expense to him, and the father consented to make the loan, without knowing that his son was to receive any compensation from the borrower for obtaining the money: *Held*, that the loan was not usurious, although the son, when he took the bond and mortgage for the loan in the name of his father, included therein for his own benefit the $28, which the lender had agreed to give him for his services. *Crane* v. *Hubbell*, 7 *Paige*, 413.

189. Where a security which is given on a loan of money is valid at its creation, no subsequent agreement of the borrower to pay an usurious premium for the further forbearance of the loan will invalidate the original security, or prevent the collection of the money lent, with legal interest thereon; but the subsequent agreement for the usurious premium only will be void. And where any usury has been reserved by the lender, under such subsequent agreement, it will, in equity, be considered as a payment towards the principal and legal interest due upon the security for the original loan. *Ibid.*

190. Where, upon an application for the loan of money, it is by the agreement made a condition of the loan, that the borrower shall receive from the lender uncurrent bills, at a higher rate than their value in cash or current funds, the loan is usurious. *Cleveland* v. *Loder*, 7 *Paige*, 557.

191. *Aliter*, where there is no agreement to make the loan in a depreciated currency, but the borrower, at his own request and for his own accommodation merely, receives payment of the loan in bills which are under par at the place where the loan is made. *Ibid.*

192. Where the money loaned was secured by a transfer of stocks, and it was made a condition of the loan that the lender should have the option to retain the stocks with the dividends at the market value of the stock, at the time of making the loan, or to receive back his money, with interest thereon, at the time appointed for its payment: *Held*, that the stipulation for a contingent benefit to the lender beyond the legal interest, in an anticipated rise in the value of the stock, rendered the contract usurious. *Ibid.*

193. Upon a contract for the loan of money, the lender is not at liberty to stipulate, even for a contingent benefit, beyond the legal rate of interest, if by the terms of the agreement he has the right to demand a repayment of the money lent, with the legal interest thereon, at all events. *Ibid.*

194. Where a note is discounted at a bank, at the rate of seven per cent. per annum, for the time such note has to run, under an agreement between the borrower and the officers of the bank, that he shall receive the money lent in the bills of such bank, and will, at his own expense, cause such bills to be kept in circulation until his note becomes due and payable, the agreement for such loan is usurious and void by the usury laws of this state. *Pratt* v. *Adams*, 7 *Paige*, 615.

195. A contract for the loan of money, at a rate of interest which is allowed by the laws of the state where such contract is made, and where the money is actually to be loaned, is a valid and binding contract, although by the terms of the contract the money is to be repaid in another state, where the legal rate of interest is less; if the making of such loan in the state where the contract is made, is not a mere device of the parties to the agreement, to evade the usury laws of the state where the money is to be repaid. *Ibid.*

196. But it seems that a contract made out of the state by persons residing here, for a loan of money at a higher rate of interest than is allowed to be taken here, cannot be enforced in the courts of this state; provided it be shown that the making of the contract for the loan in another state was a mere device of the parties to cover an usurious premium for the use of the money, and evade the operations of the laws of this state upon such contract. *Ibid.*

197. Where, upon an application to a bank for a loan of money upon a discount of notes, it was agreed, that if the notes were discounted, the borrower should receive bills of exchange for the amount of the loan at a higher premium than the cash value of such bills: *Held*, that the discount of the notes was illegal and usurious, and that the legal effect of the transaction would not be altered, by proving that there was a custom among the sellers of bills of exchange, to charge a higher premium for their bills when they sold on a credit than when they sold for cash. *Ibid.*

198. Whether an assignment to trustees for the benefit of the creditors of the assignor, which intentionally provides among other things for the payment of usurious loans, together with the illegal premiums agreed to be paid by him upon such loans, is not of itself illegal and void under the usury laws, so that no title to the property rests in the assignees by such assignment? *Quere. Ibid.*

199. Where the purchase of a negotiable note at a greater discount than legal interest, from a person who was supposed to be the legal holder and owner thereof, but who was in fact the mere agent of the drawer, rendered the note void for usury in the hands of the

purchaser, or whether such purchaser was protected to the extent of the money actually paid for the note, under the provisions of the Revised Statutes relative to usury? *Quere.* *Michell* v. *Oakly*, 7 *Paige*, 68.

200. Where a judgment has been recovered upon a note alleged to be usurious, previous to the act of 1837, for the prevention of usury: *Held*, that the party against whom the judgment was recovered, could not come into the court of chancery for discovery and relief against the judgment, without offering to pay the money actually lent and legal interest thereon. *Campbell* v. *Morrison*, 7 *Paige*, 157.

201. Under the provisions of the Revised Statute, as they existed previous to the act of May 1837, the *bona fide* purchaser of an usurious note, who had notice before he had fully paid for the same, that it was usurious, can only recover from the maker to the extent of the purchase money which had been paid by him before he was notified that the note was usurious. *Judd* v. *Secor*, 8 *Paige*, 548.

202. Upon a bill in chancery, for relief against a usurious contract, the court is not authorized to decree payment to the defendant of the amount equitably due, unless the complainant has given the court authority to make such decree by offering in his bill to pay whatever is equitably due. *Ibid.*

203. Where the holder of a usurious bond and mortgage files a bill of foreclosure against the mortgagor, and makes a judgment creditor of the latter a party to the suit, for the purpose of obtaining a decree which will destroy the lien of the judgment upon the premises, in the hands of a purchaser under such decree, the judgment creditor may avail himself of the defence of usury, to the full extent of his legal lien upon the premises by virtue of his judgment, although the mortgagor suffers the bill to be taken as confessed. *Post* v. *Dart*, 8 *Paige*, 639.

204. A purchaser of a mere equity of redemption on mortgaged premises incumbered by a usurious mortgage, who, by the terms of his conveyance, takes the premises subject to the lien and payment of such mortgage, cannot set up the defence of usury in the mortgage, and thus obtain an interest in the land which the mortgagor never intended or agreed to transfer to him. *Ibid.*

205. Nor can a mere stranger insist upon the invalidity of a usurious mortgage, in respect to which he is neither a party or a privy. *Ibid.*

206. But the defence of usury may be set up by any one who claims under the mortgagor and in privity with him; for the usurious mortgage is void, not only as to the mortgagor, but as to all others

who succeed to his rights in the mortgaged premises, either by operation of law or otherwise. *Ibid.*

207. A judgment creditor, where judgment becomes a legal lien upon the whole interest of the mortgagor in premises incumbered by a prior usurious mortgage, may obtain a perfect title to the premises by a sale and purchase under his judgment, and may then enjoy the same as fully as the judgment debtor could have done, had he continued to be the owner. *Ibid.*

208. Where one applied for a loan of money, which was agreed to be loaned to him upon usury, and he agreed to obtain his brother's bond and mortgage, to secure the loan and usurious premium, and the borrower thereupon forged a bond and mortgage upon his brother for the amount, and transferred it to the lender, and received the money thereupon, deducting the usurious premium: *Held*, that the lender could not recover back the money lent upon usury by reason of such fraud; and that the brother, whose name had been forged, was not liable for a part of the money which had been applied to pay off an incumbrance upon his property, he not having been privy to the forgery. *Thomas* v. *Fish*, 9 *Paige*, 478.

209. Where a security is not valid, as between the parties, but is made for the mere purpose of being sold at a discount of more than legal interest, it is not valid in the hands of a purchaser who buys it for less than the amount, although he is ignorant of the object for which it was made, and supposes it is a valid security in the hands of the person from whom he receives it at a discount. But the party who obtains the money upon a false representation, that the security is valid and justly due, will be liable to refund the money thus fraudulently obtained. And he will also be liable to criminal prosecution for obtaining the money by false pretences, and with intent to defraud. *Ibid.*

210. Where the purchaser of a chose in action parts with his money upon an agreement which he knows to be illegal and usurious, he cannot recover back the money from the borrower, on the ground that the latter had palmed upon him a forged security. *Ibid.*

211. Where the purchaser of land under a contract payable by instalments, had paid the principal part of the purchase money, but being unable to pay a portion of the last instalment, which had become due, applied to the vendor for an extension of the time of payment for a few months, which the vendor refused, unless the purchaser would consent to repurchase the land, and pay therefor $300, in addition to

the $710 due upon the contract, and the vendor thereupon gave a deed for the land, and took back a bond and mortgage for the whole amount due, including the $300 and interest: *Held*, that the pretended resale was a mere cover for obtaining more than legal interest for the forbearance of the payment of the $710, and that the bond and mortgage were therefore usurious and void. *Held*, also, that the bond and mortgage, being void for usury, the original debt was not merged therein, but remained an equitable lien upon the land as a part of the purchase money due upon the first contract. *Crippin* v. *Hermance*, 9 *Paige*, 211.

212. Where three persons agree to purchase lands for their joint benefit, and that one of them shall advance all the money upon the purchase, to be refunded out of the proceeds of the sale only, it is not a contract for the loan or forbearance of money; and a stipulation, that the one who advanced the money shall receive more than one-third of the land or of the proceeds thereof, in consideration of making such advance, is not usurious. *Quackenboss* v. *Leonard*, 9 *Paige*, 334.

213. Where a usurious negotiable note was made before the act of 1837, repealing the provisions of the Revised Statutes making such notes valid in the hands of *bona fide* holders, it cannot be transferred subsequent to the passing of that act, so as to prevent the maker of the note from setting up the defence of usury. *Morse* v. *Hovey*, 9 *Paige*, 197.

214. The owner of land, who has given a usurious mortgage thereon, may sell or mortgage the land to another generally, and give to such purchaser or mortgagee the same right to contest the validity of the first mortgage as he has himself. But he may affirm the validity of the usurious mortgage, by selling the equity of redemption in the mortgaged premises only, or by selling or mortgaging the land, subject in express terms to the previous mortgage; in which case the purchaser or subsequent mortgagee will be entitled to the equity of redemption merely, and cannot question the validity of the prior mortgage. *Shufelt* v. *Shufelt*, 9 *Paige*, 137.

215. Money which has been recovered and collected at law in a suit upon a usurious security, in which suit there was a legal defence, cannot be recovered back from the plaintiff in such suit, either at law or in equity. *Bartholomew* v. *Yaw*, 9 *Paige*, 165.

216. Where a suit at law is brought upon a usurious security, if the defendant has a legal defence he must insist upon it in that suit; and where a discovery is necessary to establish such defence, he must file his bill of discovery and obtain an injunction to stay the suit at

law until the discovery is made, so as to enable him to use the answer in the trial at law. *Ibid.*

217. The surety in a usurious contract has the right to set up the defence of usury to a suit brought against him and the principal debtor on such contract, and to file a bill in chancery, if necessary, to establish the defence; although the principal debtor refuses to join as a complainant in the bill. But he has no right to make the principal debtor a complainant in the suit without his consent. *Morse* v. *Hovey*, 9 *Paige*, 197.

218. Upon a bill filed to set aside a contract on the ground of usury where the contract was made with the defendant personally, if any of the facts stated in the bill as constituting the usurious agreement are not denied in the answer, they will, upon the hearing of the cause, be considered as true, under the provisions of the 17th rule of the Court of Chancery. *Anderson* v. *Rapelje*, 9 *Paige*, 483.

219. Whether the real plaintiff in a suit at law upon a usurious note, who has brought his suit in the name of another person as the nominal plaintiff, can be compelled to testify as to the usury under the provisions of the act of 1837 on that subject? Quere. *Boggs* v. *Bullen*, 9 *Paige*, 226.

220. Denials of usury in an answer will not be effectual when admitted facts lead to the conclusion of usury. *Manice* v. *The Dry Dock Company*, 3 *Edwards*, 143.

221. Manice & Co. required bills of exchange on England, and it was agreed by the Dry Dock Company to draw them at a premium, and on a credit of sixty days, adding six per cent. interest for the time of credit, and Manice & Co. were to give their notes at sixty days for the amount of the bills and premium, with interest, and deposite other notes as collateral security. *Held*, that this was a sale of the bills of exchange, and not a loan and forbearance whereby any usury attached. *Ibid.*

222. A party who is the direct assignee in trust of a mortgagor, may impeach the mortgage for usury. Such assignee stands in the place of the mortgagor, and has his rights. *Pearsall* v. *Kingsland*, 3 *Edw.* 195.

223. T P executed a bond and mortgage to the G. I. Co. for $10,000. They pressed a foreclosure and had obtained a decree. T P got S K to advance $8,000, and paid the balance himself to the company. The bond and mortgage and decree were assigned by the G. I. Co. to S K, and the latter (S K) afterwards pressed a sale under

the decree for the whole $10,000 and interest. The court *held*, that S K could only have a sale for $8,000 and interest. *Ibid.*

224. A mortgage made to an Insurance Company is not void for usury, on the ground that under a covenant allowing the mortgagees to insure they caused such insurance to be effected in their own office, and charged the premium. (*The case of the Utica Insurance Company* v. *Caldwell*, 3 *Wend.* 296) containing the same doctrine approved. *N. Y. Fire Ins. Company* v. *Donaldson*, 3 *Edw.* 199.

225. Certain state stock, held by a banking association, was depreciated in the market, yet a party chose to take it at par, and give his bond and mortgage for it at the par amount. *Held*, not to be a usurious transaction. *Willoughby* v. *Comstock*, 3 *Edw.* 424.

226. Where a note, prior to the act of the 15th May, 1837, was tainted with usury, and afterwards renewed from time to time, but no fresh usury accrued, the original taint was kept upon it, and brought it within such statute, and no offer to pay was necessary to be made in the bill. *Folsom* v. *Blake*, 3 *Edw.* 442.

227. A bill for usury under the act of 15th of May, 1837, will not be sustained unless there are special grounds for coming into chancery. *Ibid.*

228. The statute against usury does not apply, where a loan is made to be returned within a certain time, or upon a certain event depending upon a casualty which hazards both principal and interest, without any right to look to the borrower. *Dowdall* v. *Lenox*, 2 *Edw.* 267.

229. Where a monied transaction is substantially a loan upon an understanding that the money or thing is to be returned at all events, the lender cannot lawfully reserve to himself any thing in the shape of interest or profit beyond the amount of the legal interest. Nor will any shift or contrivance take the case out of the statute. *Ibid.*

230. The test of usury is, whether the substance of the transaction is really a loan of money or the creation of a debt, whatever may have been the form of the contract; and if it be a loan, then whether the lender or payee has stipulated for or secured to himself, by means of the loan and arising from it or from any thing connected with it and forming a part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to, exceeding the rate of interest allowed by law. *Ibid.*

231. N owed L $4,500. The former applied, on behalf of himself and D, to L for a loan of $60,000, to purchase a cargo, and so that the old debt of N of $4,500 was to be secured by the same bond

and in the same way whereby the $60,000 was to be secured. In fact, a bond was given by N and D, with a surety for $64,500 and interest, and L also held the return cargo (as had been agreed) for better security. *Held*, that the adding of N's old indebtedness of $4,500 to the $60,000 borrowed by N and D did not make the matter usurious, either as between N and L or D and L. *Ibid.*

232. An obligor may purchase his own obligation from the person to whom he has executed it at less than its face, and such purchase will not be usurious, provided such purchase is *bona fide* and not connected with any previous agreement so to purchase. Such purchase would be usurious if coupled with an agreement or understanding so to do, made before the execution of the obligation. *Staley* v. *Kneeland*, 1 *Clark's R.* 30.

SECTION XXIII.

NORTH CAROLINA.

Revised and passed the session of 1836 *and* '37, *chap.* 117.

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That no person or persons whatsoever, upon any contract, shall directly or indirectly take for loan of any money, wares, merchandizes or commodities whatsoever, above the value of six dollars, by way of discount or interest for the forbearance of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time; and that all bonds, contracts and assurances whatsoever, for the payment or any principal or money to be lent, or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars in the hundred, as aforesaid, shall be utterly void; and that all and every person or persons whatsoever, which, upon any contract, shall take, accept and receive, by way or means of any corrupt bargain, loan, exchange, shift or interest of any moneys, wares, merchandizes, or other thing or things whatsoever, or by any deceitful way or means, or by any discount, covin, device, or deceitful conveyance for the forbearing or giving day of payment for one whole year of or for their money or other thing, above the sum of six dollars for the forbearing of one hundred dollars for a year, and so after that rate for a greater or less sum, or for a longer or shorter time, shall forfeit and lose, for every such offence, the double value of

moneys, wares, merchandizes and other things so lent, bargained, exchanged or shifted, the one moiety of all which forfeitures to be to the state, and the other moiety to him or them that will sue for the same by action of debt in any court of record within this state.

1. Defendant owed plaintiff a certain sum of money, but on the day of payment not having the money, he agreed with plaintiff to give him more than six per cent. for indulgence; a bond was given for the principal sum, and the amount above the legal interest was paid partly in money and partly by a note. An action being brought on the bond, it was held, that the transaction was usurious and the bond void. The act against usury cannot be evaded by taking two securities, one for principal and another for the unlawful premium. *Glisson* v. *Newton's Ex.*, 1 *Hay*, 336.

2. Where A had judgment and execution against B, and on the day of sale consented to indulge B in consideration of a sum more than legal interest for the time of indulgence, and this sum was paid: *Held*, that this was usurious, and A was liable to an action for the penalty under the statute against usury. *Curtis* v. *Brund*, *Conf. R.* 28.

3. A, residing in North Carolina, contracted in New York a debt with B, who lived in that place; afterwards, A paid to the agent of B in North Carolina a part of the debt, and credit having been given him for four months for the balance, interest at the New York rate (seven per cent.) was calculated on the balance for four months and added thereto, and for that sum A gave his bond. *Held*, that this bond was not contrary to the laws of North Carolina. *McQueen* v. *Burns*, 1 *Hawks*, 476.

4. A, being embarrassed, and having a promissory note, payable to himself, endorsed and delivered it to H, his clerk, with instructions to raise money on it by a sale of it to the plaintiff, and at the same time directed the clerk to conceal from the plaintiff that the note was his, A's, property. The clerk sold it to the plaintiff at a discount of thirty-three and one-third per cent., and represented it as his own property, and endorsed the paper to the plaintiff without recourse to himself in the event of the failure of the others who were liable on it. In a suit by the plaintiff against A, it was *held*, that the transaction was usurious. *Ruffin* v. *Armstrong*, 2 *Hawks*, 411. Because plaintiff made title through the usury—but *aliter* against the makers.

5. A, being in want of money, applied to B, and it was agreed between them that A should receive from B the note of one L, which he held, and give therefor to B a bond payable to S for the sum due

on L's note, with fifteen per cent. A gave his bond accordingly to S, by whom it was endorsed to the brother of B, in whose name a suit was brought and judgment recovered, and the money was collected by an execution against A. *Held*, that A was guilty of usury; and that it is no defence for a lender of money on usury, in an action *qui tam*, to say that he acted as another's agent, unless he disclose the agency at the time of contracting. Whether being *particeps criminis*, such disclosure at the time would avail him. *Qui tam*, *Wilkes* v. *Coffie*, 3 *Hawks*, 28. See *Duvall* v. *Vannoy*, 3 *Dev.* 43. *Iredell.*

6. Wherever the debtor, by the terms of the contract, can avoid the payment of a larger, by the payment of a smaller sum at an earlier day, the contract is not usurious, but conditional, and the larger sum becomes the penalty. Where the holder of a bond, for the payment of a certain sum, promised to surrender the bond upon the payment of a less sum at an earlier day; to take advantage of such promise, there must be a strict compliance on the part of the obligor. To constitute usury, the obligation to pay more than the legal rate of interest, must be absolute on the face of the transaction, (i. e., not conditional or upon a contingency.) A contract good in its creation, is not avoided by a subsequent usurious consideration; but such subsequent taint will affect the after holder as against the endorser. *Moore* v. *Hilton*, 1 *Dev. Eq.* 429.

7. Although it may be usury in an individual to take interest in advance upon a loan, it is not so in a bank discounting a negotiable security, even if payable directly to the bank, because such a course is sanctioned by legislative and judicial determinations, and by the general understanding of the community. *State Bank* v. *Hunter*, 1 *Dev.* 100.

8. Deducting interest by a bank for the days of grace upon discounting a bond (which it seems is discountable in N. C.) is not usurious, although the obligor is not entitled to the days of grace, the parties supposing that, on such an instrument, he was entitled. *Ibid.*

9. Debt on bond,—and the case was this:—N executed a bond upon a *bona fide* consideration to M, who afterwards sold the same to Collier, at a greater discount than six per cent. per annum, and by his endorsement bound himself for the full amount of the bond. Collier sued N, and the plea usury. *Held*, that the plaintiff may recover the full amount of the obligor, notwithstanding he claims through an usurious endorsement.

10. A mistake in the construction of the statute of usury, if it results in taking more than legal interest, will render the contract usurious.

But an error in *fact*, by which more than the legal rate of interest is reserved, will not vitiate.

11. If a security be usurious in its creation, it is void in the hands of an innocent holder. But if valid in its inception, a subsequent usurious agreement does not avoid it.

12. The object of the statute of usury is to protect the borrower, not to enable a lawful debtor to avoid the payment of a lawful debt; and hence the latter cannot aver an usurious assignment, so as to defeat the assignee.

13. A distinction exists between the usurious discount of accommodation notes and notes which are perfect, and on which an action can be maintained. In the first case, the discount is a loan to the maker, and the note is void under the statute. In the second, it is the purchase of an existing valid security, and the endorsee may recover on it. *Collier* v. *Neville*, 3 *Dev.* 30.

14. A sheriff, who had collected money upon an execution, and had neglected to pay it to the plaintiff, and was thereby subject to damages at the rate of twelve per cent. per annum, having lent the money thus collected to a third person, at the same rate of interest, was held guilty of usury, and liable to the penalty of the act of 1741.

15. A pure contract of indemnity against a doubtful claim is not within the statute against usury, but an agreement whereby the borrower agrees to pay the lender the same rate of interest which the latter is bound to pay a third person, and which exceeds the legal rate, is not a contract of indemnity within the meaning of the rule, and this whether the obligation of the lender be created by law or by stipulation. *Dowell* v. *Vannoy*, 3 *Dev.* 43.

16. It seems that an agent, who lends money at an usurious rate of interest, is liable to the penalty, notwithstanding he discloses his character. *Ibid.*

17. Where A contracted for land, and placed one-third of the purchase money in the hands of B, who completed the purchase and then leased the land to A, at the rate of twelve and a half per cent. upon the sum advanced by him, and gave a bond to A to convey to him at the expiration of the term, upon the payment of the advance and rent; and A was embarrassed, and made permanent improvements; it was held, that the arrangement was a mortgage to secure a usurious loan. *Thorp* v. *Ruks*, 1 *Dev. & Bat. Eq.* 613.

18. In an action to recover the penalty given by the statute against usury, it is not necessary to show that the principal money had been paid. The offence is complete when any thing is secured for the for-

bearance over and above the rate of six per cent. per year. *Seawell* v. *Schomburger*, 2 *Murphy*, 200.

19. Where an usurious agreement is made in this state; but the illegal interest is secured in South Carolina, an action will not lie for the penalty. *Graham* v. *Lewin*, *N. C. Term R.* 189.

20. Action of debt on the statute of usury: Pleas, general issue and statute of limitations: motion by plaintiff to amend the pleadings by replying to the statute of limitations, "a former suit between the same parties, and a nonsuit therein; and that this action was brought within a year and a day thereafter." Motion disallowed, for, 1st, the amendment, if allowed, would be unavailing. The statute limiting penal actions contains no such saving as the plaintiff wishes to reply, nor a saving of any description. 2d. The nature of this action forbids the amendment. This was no man's particular cause of action until brought. It became his by the suit, and he lost it by the dismission. It then became common, and liable to be brought by any person. If brought by a stranger, it was a new suit; so if brought by the same person. It was not a continuance of his old suit, for it was his no longer than it depended. *Clark* v. *Rutherford*, 3 *Murphy*, 237.

21. In debt *qui tam* under the statute of usury, the plaintiff may recover less than he declares for, and the verdict shall be good. *Dozier* v. *Bray*, 2 *Hawks*, 57.

22. The payment of the usurious interest to the sheriff on an execution, or to an assignee, and much more to an agent, completes the offence. *Dowell* v. *Vannoy*, 3 *Dev.* 43.

23. In debt for usury, the declaration stated a loan to A, but the proof was of a loan negotiated by A, as the avowed agent of B. *Held*, that the proof did not support the declaration; for the loan proved was, in fact and in law, a loan to B. *Jones* v. *Cannady*, 4 *Dev.* 86.

24. In questions of usury the real transaction may always be shown, as well to support as to avoid the security. *Ibid.*

25. A return by a sheriff of satisfaction to an execution issued on a judgment for a debt infected with usury, is not sufficient evidence of the receipt of the usurious interest, to charge the lender in an action for the penalty. *Wright* v. *McGibbony*, 2 *Dev. & Bat.* 474.

26. It must be shown that the lender has actually *received the usurious interest*. *Ibid.*

27. Complainant having neglected to plead usury to an action at law upon his contract, and having in his bill shown to the court no reason for his neglect, a demurrer to a bill of injunction, founded on the usury, was sustained, and the bill dismissed. The bill was also

defective, because it did not waive the penalty. *Branton* v. *Dickson*, 1 *Murphy*, 225.

28. The general ground upon which equity proceeds in cases of usury, is to compel a discovery, upon the complainant's bringing into court the principal sum advanced with legal interest, and then the court will relieve against the usurious excess. *Taylor* v. *Smith*, 2 *Hawks*, 465.

29. In a bill for the discovery of an usurious contract it is not necessary to waive the penalty, where the usurious interest has *not* been paid. In such case the rule of practice requires the tender of the sum due, or bringing it into court. But where there is an independent ground insisted on in the bill, as going to avoid the whole transaction, (though not entitled to that effect,) it affords a justification to the court in relaxing this strict rule of practice. *Ibid.*

30. A court of equity is bound by the statute of usury, and although upon the bill of the borrower, aid will be extended upon the terms of his repaying the sum, but with lawful interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed. *McBrayer* v. *Roberts*, 2 *Dev. Eq.* 75.

31. A court of equity never assists a creditor who has been guilty of usury; and when, according to the bill, usurious interest was incorporated in a note by the fraudulent contrivance of the debtor, for the purpose of taking advantage of it and avoiding the debt, relief was refused. *State Bank* v. *Knox*, 1 *Dev. & Bat. Eq.* 50.

32. A contract tainted with usury is denounced by the law of the land as corrupt and utterly void, and every court must treat it as holding the character which the legislature has stamped upon it. It is regarded as an oppression practised upon the borrower. A court of equity, therefore, cannot be invoked to aid such a contract, in whole or in part, or to redress the oppressor, because the meditated injury has, by the artifice of the intended victim, been made to recoil upon himself. Oppression cannot demand help against fraud. The court is not at liberty to array its imagined wisdom against the legislative will, or to defeat public policy by a recourse to the code of honor and morality. *Per Gaston*, in the above case.

SECTION XXIV.

OHIO.

Chapter 586. *An act fixing the rate of interest.*

SECTION 1. *Be it enacted*, &c., That all creditors shall be entitled to receive interest on all money, after the same shall become due, either on bond, bill, promissory note, or other instrument of writing, or contract for money or property; on all balances due on settlement between parties thereto, or money withheld by unreasonable and vexatious delay of payment; and on all judgments obtained, from the date thereof; and on all decrees obtained in any court of chancery, for the payment of money, from the day specified in the said decree for the payment thereof: or if no day be specified, then from the day of the entering thereof, until such debts, money or property is paid, at the rate of six per centum per annum, and no more.

SECT. 2. That the "act fixing the rate of interest, and for the prevention of usury," passed December twenty-ninth, eighteen hundred four, be, and the same is hereby repealed. This act shall be in force from and after the first day of June next. *Passed January* 12, 1824.

When a money-lender takes from a borrower an obligation for a greater amount than the money lent and the stipulated interest, with an undertaking on his part, to receive a less sum in discharge of the obligation if punctually paid, chancery may relieve against the excess as a penalty. *Brockway* v. *Clark.* 6 O. R. 50.

The act of 1804 (O. L. c. 69) fixed the rate of interest at six per cent. per annum, and provided for the punishment of usury. That law was held to make so much of contracts as stipulated for more than the legal rate of interest void; and under it the courts were in the practice of enjoining from collecting the excess, when the debtor tendered the amount of principal and lawful interest due. *Ibid.*

The existing act differs from the law formerly in force in very essential particulars. The former contains no provision forfeiting the debt, nor any one prohibiting the contracting for, or the receiving any rate of interest; the latter provided that any person demanding or receiving more than six per cent. per annum, on any contract, debt, or demand whatever, forfeited the whole amount of the debt on which such illegal interest was charged or received. The former is entitled,

'an act fixing the rate of interest;' the latter, 'an act fixing the rates of interest, and *for preventing usury.*' *Ibid.*

When payments have been made on instalments not due and payable, such payments should be applied to the extinguishment of principal and such proportion of interest as has accrued upon the principal thus extinguished. *Miami Exporting Company* v. *Bank of the United States.* 5 *O. R.* 261.

An agreement to pay interest upon interest, after the interest has become due, is not usurious. *Fabes and Adams* v. *Cantfield,* 3 *O. R.* 18.

In an action brought to recover arrearages of interest, payable yearly by agreement, interest may be recovered upon the successive annual charges from the time they severally fall due. *Watkinson* v. *Root,* 4 *O. R.* 373.

SECTION XXV.

PENNSYLVANIA.

Act of 2d March, 1723. *An act for reducing the interest of money from eight to six per cent. per annum.*

SECTION 1. No person shall, directly or indirectly, for any bonds or contracts to be made after the publication of this act, take for the loan or use of money, or any other commodities, above the value of six pounds for the forbearance of one hundred pounds, or the value thereof, for one year, and so proportionably for a greater or less sum.

SECT. 2. If any person or persons whatsoever do or shall receive or take more than six pounds *per cent.* per annum, on any such bond or contract as aforesaid, upon conviction thereof, the person or persons so offending shall forfeit the money and other things lent, one half thereof to the governor, for the support of government, and the other half to the person who shall sue for the same, by action of debt, bill, plaint or information, in any court of record within the province, wherein no essoin, protection, or wager of law, or any more than one imparlance shall be allowed.

1. Where more than legal interest is included in any specialty or note, the whole amount cannot be sued for and recovered; but the plaintiff is entitled to a verdict for the just principal and interest. 2 *Dallas,* 92.

2. The rule of law is, that interest is allowed on goods sold and delivered, and on all open accounts, where by the usual course of dealing, or by express agreement, a certain time is fixed upon for payment, on money lent and advanced; on arrears of rent, unless it would be inferred by the landlord's conduct that he did not mean to insist upon it, or he demands more than is due, or there are other special circumstances which might make the charge of interest improper; and generally, wherever one person detains the money of another, without any right and against his consent. 6 *Binney* 162. 1 *Sar. & Ra.* 176. 1 *Binney*, 488. 1 *Dallas*, 315, 349. 2 *Dallas*, 193. 4 *Dallas*, 289.

3. But where a person was ignorant that a sum of money had been paid for his use by the plaintiff, he is not chargeable with interest but from the time he was informed of the fact. 1 *S. & R.* 176.

4. If the landlord resorts to the land itself for the payment of the arrears of *ground rent*, he cannot charge interest. 2 *Binney*, 146.

5. In the case of promissory notes, and generally, whenever a certain day is fixed for payment, interest is to be calculated from the day of payment, and when no day is fixed, from the time of demand. 1 *Dallas*, 52. 1 *Smith*, 158.

6. Money paid on account of a bond should be first applied to the discharge of the interest due, and the residue credited towards the satisfaction of the principal. 1 *Dallas*, 378.

7. A dormant partner is liable for interest, upon the receipt of the money, by an active partner, without his privity or participation. 1 *Dallas*, 349, *n. 2d ed.*

8. A factor or agent who does not with due diligence remit the money of his principal, is chargeable with interest. *Ibid.*

9. If the sheriff take money out of bank, which has been by him deposited there by the agreement of the parties who are contesting the right of the money, he is bound to pay interest *himself* from the time he takes it out. 3 *Binney*, 121.

10. A judgment carries interest, although it is agreed that no execution shall issue until the plaintiff has perfected the title, to certain land for which the bond on which the action was brought was given. 6 *Binney*, 435. 5 *Binney*, 121.

11. Where interest is not of course, if the defendant offers to the plaintiff as much as is due to him, he is not liable to interest on the amount; but if he offers too little, and the plaintiff brings an action to recover the amount, he is. 3 *Binney*, 295.

12. The testator bequeathed to each of his legatees, a certain

sum of money, to be placed at interest two years after his death, for their own benefit, and the principal and interest to be paid as they should respectively attain the age of twenty-one years; but if any of them should die before the share of such legatee was to be divided among the others: *Held*, that no interest was recoverable by any legatee during minority, but that it must accumulate, in order to form a fund for the other legatees if he should die before coming of age. 5 *Binney*, 477.

13. On the valuation of the real estate of an intestate, the person accepting the estate is bound to pay interest for the distributive shares of the other heirs, from the time of his acceptance. 1 *Yeates*, 392.

14. A tender of the sum due does not amount to an actual payment and discharge, but it suspends the interest until a subsequent demand and refusal. 1 *Dallas*, 407.

15. Where a person is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition; as in case of a garnishee in a foreign attachment. 2 *Dallas*, 103. 1 *Yeates*, 474.

16. Interest is not to be paid by a mere trustee for the money which he holds for the use of another, unless he neglects to pay it on demand; and if there is no proof of demand, it must be calculated only from the commencement of the action. 2 *Dallas*, 182.

17. The defendant having contracted to make a conveyance to pay a specific sum within a limited time, is guilty of an immoral act in omitting to perform either of the alternatives; and the jury may give damages, by way of interest, beyond the penalty of the bond. 2 *Dallas*, 255.

18. The plaintiff is entitled (notwithstanding the penalty) to recover damages commensurate with the injury suffered by a non-performance. 4 *Dallas*, 149.

19. Where the condition of a bond is for the payment of interest annually, and the principal at a distant day, the interest may be recovered before the principal is due, in an action of debt on the bond; but no interest can be recovered on such interest. 1 *Binney*, 165.

20. A trustee is entitled to interest for advances made to supply the deficiency of the trust fund. 1 *Binney*, 488.

21. Although interest upon interest is in general unlawful, yet there are cases in which interest is considered as changed into principal and permitted to carry interest, as where a settlement of accounts takes place *after* interest has become due, or an agreement is

made *after* interest becomes due, that it shall carry interest. Any agreement for interest upon interest, to be lawful, must be made *after* the interest has become due, and must be *prospective*, that the interest then due shall carry interest. An original agreement that if the interest is not paid at the time it shall be due it shall carry interest, though it would not amount to usury, so as to render the contract connected with it illegal and void, yet the party cannot recover such interest either at law or in equity. 1 *J. Ch. R.* 14. 6 *J. Ch. R.* 313. *See* 4 *Yeates*, 220. 5 *Barn. & Alder.* 34. 7 *Sar. & Ra.* 15. 11 *Vesey, Jr.* 93. 3 *W. C. C. R.* 350, 396.

22. It is doubtful if this rule of charging interest upon interest relates to real securities. See 9 Vesey, Jr. 223, though in 4 Yeates, 220 it was so held. *Purden's Digest.*

23. Where the contract is made in another state, the interest allowed in that state may be given. *Jaffray* v. *Dennis*, 2 *W. C. C. R.* 253.

24. So where a note was given in China, payable in eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per cent. per month, from the expiration of the eighteen months. *Cowqua* v. *Landerburn*, 1 *W. C. C. R.* 525.

25. It seems that interest on a judgment in another state cannot be recovered on a count for such interest in a suit on the judgment. *Benton* v *Burgot*, 10 *S. & R.* 240.

26. On an obligation to pay four per cent. interest, interest will be estimated at the same rate after the day of payment. *Cooper* v. *Coates, cited* 1 *Yeates*, 8.

27. A writing for the payment of money *on demand* for value received, bears interest only from the demand. *Addis.* 137.

28. In an action to recover contribution to a general average it was *held*, that interest ran from the time that the money was advanced upon which the average rose. *Sims* v. *Willing*, 8 *S. & R.* 103.

29. If a *certain* gain be reserved to the lender, besides the interest, it is usury. *Addis.* 126.

30. Under the act of assembly a transaction may be usurious where the price of land or other property is retained by the purchaser on condition of paying interest for the use of it, although the annual compensation be denominated rent. *Evans* v. *Negley*, 13 *S. & R.* 218.

31. A and B borrowed money of the defendant and gave their notes with usurious interest. When these became due, they drew new notes, making the principal and interest of the former notes

principal. *Ruled*, that though no money was actually paid to the defendant, the second notes were a satisfaction of the first; and that the usury was complete in the defendant's accepting them. *Musgrove qui tam* v. *Gibbs*, 1 *Dall.* 216.

32. Where a partial payment had been made on account of a note for a sum of money borrowed on usurious interest, it was ruled that the usury was complete. *Ibid.*

33. If one *takes* usurious interest, he incurs a forfeiture; but in an action brought to recover the amount of the loan he is nevertheless entitled to a verdict. 2 *Dall.* 92. 12 *S. & R.* 46.

34. Where more than legal interest is included in a bond or note, the plaintiff is only entitled to verdict for the just principal and lawful interest. *Ibid.*

35. A mortgage given as security for an usurious loan is not *void;* but the mortgagee may recover the sum loaned, with legal interest. *Turner* v. *Calvert*, 12 *S. & R.* 46.

36. Where a bond was conditioned for the payment of money in seven years, "and the lawful interest thereon yearly, and every year from the date," with an agreement endorsed thereon by the obligor, that "if any part of the said interest shall remain unpaid for the space of three months, to allow the said obligee lawful interest for the same from the end of the said three months until paid;" it was held that the agreement was not usurious, and might be enforced. *Pawling* v. *Pawling*, 4 *Yeates*, 220.

37. Where A and B, partners in trade, had borrowed money upon an usurious contract, and A gave his separate securities to the creditor for the repayment of the money borrowed, for his proportion of which B subsequently gave his bond to A; and judgment being entered on this bond, the court refused a rule to show cause why execution should not be stayed on this judgment, until the determination of a suit brought by B against A upon the act of assembly against usury. *Shoemaker* v. *Kurcliff*, 1 *Dall.* 127.

38. *It seems* the allowance of a commission, to the holder of certain notes, by the drawer, in case such notes are not paid when due, is usurious. *Loze* v. *Passmore*, 5 *S. & R.* 51.

39. On the trial of a *scire facias* upon a judgment, evidence is not admissible on the part of the defendant to show that the bond upon which the original judgment was entered by warrant of attorney, was usurious in its foundation. *Lyle* v. *Williams*, 15 *S. & R.* 135.

40. The amount of interest is to be determined by the law of the place where the contract is to be executed. It may be expressly reserv-

ed, though it exceed the rate allowed by the law of the domicil or the law of the forum; and where no rate is stipulated, the parties are presumed to have contracted with reference to the law of the place of performance, whether statutory or customary. If the contract is to be executed in China, the measure of damages for the breach of it, is the customary rate of Chinese interest. 2 *Watts & Serjeant*, 328.

41. The receipt of money on account of an usurious contract is a consummation of the offence, from the consequences of which the party cannot relieve himself by a subsequent release of the excess which was usurious. *Kirkpatrick* v. *Houston*, 4 *Watts & Ser.* 115.

42. Under the act of 2d March, 1723, the offence of taking usurious interest is committed by every successive receipt of such interest, and under the 6th section of the act of 26th March, 1785, a suit to recover the penalty may be brought within a year after the last successive receipt of such interest. *Lamb* v. *Lindsey*, 4 *Watts & Ser.* 449.

SECTION XXVI.

RHODE ISLAND.

January Session, 1822.

SECTION 1. *Be it enacted by the General Assembly, and by the authority thereof it is enacted*, That no person or persons whosoever shall, directly or indirectly, by himself or themselves, his or their agent or agents, attorney or attorneys, or any other person or persons whomsoever, in his or their behalf, contract for or receive, for the loan of any money, goods, wares or other commodities whatsoever, above the value of six dollars for the forbearance or giving day of payment of one hundred dollars for one year, and so after that rate for a greater or less sum, or for a longer or shorter time, or according to that rate or proportion for the loan of any money, goods, wares or other commodities.

SEC. 2. *And be it further enacted*, That if any action or suit shall hereafter be commenced upon any bond, mortgage, specialty, agreement, contract, promise or assurance whatever, which shall be made within this state after the passage of this act, and the defendant shall allege, by a special plea, that a higher or greater interest than the rate aforesaid was therein or thereby secured or agreed for, or taken, the court shall and may admit the defendant as a legal witness, upon the issue joined in such action or suit, to testify relative to the nature and circumstances of such usurious agreement; and shall also, on motion

of the plaintiff, admit such plaintiff as a legal witness, in like manner; and if on the whole evidence, the court or jury who shall try such action or suit, shall find such contract to be usurious, they shall nevertheless find for the plaintiff the principal sum of money, or real value of the goods, wares or other commodity as aforesaid, and the defendant shall recover his costs. *Provided always*, that nothing in this act shall extend to the letting of cattle, or other usage of the like nature, in practice amongst farmers, or maritime contracts amongst merchants, as bottomry, insurance, or course of exchange, as hath been heretofore accustomed.

In the year 1815, there was a negotiation for a loan between De Wolf and Prentiss, the scene of which was Bristol, Rhode Island. The sum to be loaned was $83,000, but which sum in fact was reduced below $80,000, by means of premium or bonus or imposition. The interest actually stipulated for, was twelve per cent., of which six per cent. was reserved in a bond executed at the time for $111,000, comprising compound interest, there being no annual interest reserved. The other six per cent. was secured under the aspect of a rent, payable out of lands in Kentucky, for which Prentiss executed absolute conveyances, and DeWolf stipulated to reconvey on the payment of the amount for which Prentiss gave his bond, and a sum annually by way of rent equal to six per cent. upon the $83,000, that is the sum of $4,980. This rent, it seems, was paid the first year with an additional sum of $498, added as interest and damages. And a bill of $4,980 was drawn the second year by DeWolf upon Prentiss, payable in Philadelphia, but this was returned under protest, and subsequently taken up by a bill for $5,154. The supposed usury in the sum of $83,000 was made up of three items; $32,000 as the price set upon fifteen shares of the Lexington Manufacturing establishment, transferred by DeWolf to Prentiss. The second, Treasury notes to the amount of $20,211, received at par; and the third, $30,802, bills drawn upon Philadelphia, also taken at par. Upon these three items, there was an estimated loss sustained of about $3,400. As it entered into the contract that Prentiss should secure DeWolf by a conveyance of Kentucky land to a large amount, two agents were employed and intrusted by DeWolf with the securities to be passed to Prentiss, and a power to draw upon him for the money, to be paid in Philadelphia; which Prentiss was to have the benefit of, upon complying with the articles of his contract, purporting an absolute conveyance of the land. In 1817, upon an intimation received by DeWolf that Prentiss intended

to avail himself of a plea of usury, DeWolf repaired to Kentucky, and there instituted a new negotiation with Prentiss personally, having for its object to clear the transaction of all usurious incidents, and to take security for the sum loaned at the legal interest of Kentucky, which, as well as that of Rhode Island, was six per cent. Accordingly all the instruments of writing which appertained to the contract were surrendered mutually, and a new mortgage given to secure the sum due. The original sum having been reduced by large actual payments to the sum for which the mortgage was given, and which included the same premises conveyed in the prior contract. Prentiss, the mortgagor, conveyed his equity of redemption in the land to W. T. Barry, in trust, who sold to James Johnson and R. M. Johnson, who were in possession in 1818, when DeWolf filed his bill of foreclosure in the Circuit Court of the U. S. for Kentucky. Prentiss filed no answer, and in due course the bill as to him was taken *pro confesso*. James Johnson filed an answer, claiming the premises as *bona fide* purchaser, and set up the defence of usury in the contract between DeWolf and Prentiss, and that the mortgage was usurious and void. Barry filed his answer, alleging that he was ignorant of the mortgage "except as recognized in the deed of trust;" and R. M. Johnson filed his answer, adopting that of James Johnson. The defence rested upon the assumption that the new contract was not purged of the usury; or rather, that the whole contract of 1815 was void, and could therefore form no basis or consideration for the contract of 1817. The Circuit Court decreed for the defendants, and DeWolf appealed to the Supreme Court of the U. S., where it was *held*, The contract of 1815 was not void for usury by the law of Rhode Island, even though usurious items were contained therein; and that the new Kentucky contract was purged of all usurious consideration by the agreement of the parties in 1817. And it was further *held*, that the assignee of an equity of redemption could not set up usury as a defence to a bill of foreclosure by the mortgagee. *DeWolf* v. *Johnson*, 10 *Wheaton*, 367.*

The latter holding, however, was entirely abrogated by the same court in the subsequent case of *Lloyd* v. *Scott*, 4 *Peters*, 230.

*Notwithstanding the correctness of the decision of the court in the case of *DeWolf* v. *Johnson*, it is difficult to perceive how the statute of Rhode Island could determine as to the validity of the loan in 1815. The funds were, by the terms of the agreement, to be advanced, and actually were advanced in Philadelphia, where the loan had its inception; and the law of Pennsylvania, and not that of Rhode Island, was the law of the place of performance of the lender.

SECTION XXVII.

SOUTH CAROLINA.

SECTION 1. *Be it enacted* by the honorable the Senate and House of Representatives, now met and sitting in General Assembly and by the authority of the same: That such clause of an act passed on the second day of January, in the year of our Lord one thousand seven hundred and seventy-seven, entitled an act for the reduction of interest from eight pounds to seven pounds for each hundred pounds, as makes utterly void and of no effect, all bonds, specialties, contracts, promises and assurances whatsoever, whereupon or whereby there shall be reserved or taken any interest above the rate of seven pounds in the hundred; and also such clause of the same act as provides and enacts that every person who shall take, acccept or receive, by way of interest for the loan, or for the forbearing or giving day of payment of money, or any other thing or commodity, above the sum of seven pounds in the hundred, for one year, or at that rate for a greater or less sum, or for a longer or shorter time, shall forfeit and lose treble the value of the money or other commodity so lent—be and the same are hereby repealed.

SECT. 2. *Be it further enacted* by the authority aforesaid: That every person lending or advancing money or other commodity upon unlawful interest, shall be allowed to recover, in all cases whatsoever, the amount or value actually lent and advanced; and that the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts, to be the true legal debt or measure of damages, to all intents and purposes whatsoever, to be recovered without costs.

In the Senate House, the eighteenth day of December, in the year of our Lord one thousand eight hundred and thirty, and in fifty-fifth year of the Independence of the United States of America.

H. DEAS, President of the Senate.

H. L. PINCKNEY, Speaker of the House of Representatives.

Seven per cent. the lawful interest.

1. Changing an "*indent*" from its real to its nominal value in specie when it was worth only eight and a half for one, will make a contract usurious. *Atkinson* v. *Ex. of Scott*, 1 *Bay R.* 307.

2. A note of hand usurious between the original parties to the

transaction is absolutely null and void, even in the hands of an innocent endorsee, though the holder may recover against the endorser from whom he received it, in a count for money had and received. *Payne* v. *Trageant*, 2 *Bay*, 23.

3. A broker, who negotiated the business between borrower and lender, though the payee of the note, is a competent witness to prove the usurious transaction; sending notes into market under pretence of sale to raise money, is a shift to elude the statute, if the money is to be returned. Wherever a return of the money is contemplated by the parties, it will constitute a loan and not a sale. *Ibid.*

4. No confirmation, however solemn, can give efficacy to an usurious agreement. The undertaking of one of the makers of the note to the endorsee at the time of the endorsement, stating that the note was good and he would pay it, will not enable the endorsee to recover, if the consideration of the note was usurious. *Solomons & Co.* v. *Jones & I.* 1 *T. Conf. R.* 144.

5. Where it is customary to pay interest on open accounts after the year expired, and the debtor, some time after the expiration of a year, gave his note for the amount due with interest from the expiration of the year, it is valid and not usurious. *Dickson* v. *Seriginer*, 2 *T. Con. Rep.* 501.

6. A bond with a condition that the lawful interest on the whole principal sum shall be paid annually, together with one-third part of the principal sum at the end of each year until the whole be paid off, is not usurious, and the obligee is entitled to interest on the aggregate amount of principal and interest of each instalment as it becomes due. *Gibbs* v. *Chisolm*, 2 *N. & McCord R.* 38.

7. A bond bearing interest from a period anterior to its date is not usurious. *Levy* v. *Hampton*, 1 *McCord*, 145.

8. Where a person gave a note of $500, for a valuable consideration, payable sixty days after date, and when it became due, in order to obtain the further time of sixty days, gave his due-bill for $50, and a new note for $500, payable sixty days after date; the court held the transaction usurious, and that the note of $500, as well as the note of $50, was void under the statute. But had the original note been retained at the time of giving the last notes, such original note had been valid, but having been given up, the original debt was merged in the last computation. (*Quere*, as to the last.) *Motte* v. *Dorrill*, 1 *McCord R.* 350.

9. If the maker of a promissory note fraudulently impose on the payee a promissory note for illegal interest, with a view to take ad-

vantage of the act against usury, he shall not be allowed to do so, but shall have judgment against him for the amount justly due with lawful interest. *Collins* v. *Walker*, *Brev. MS. R.*

10. A note endorsed for the accommodation of the maker, who procures it to be discounted at an illegal rate of interest, is void as against the maker and endorser, in the hands of an innocent holder; and the fact of the note being a renewal for part of the original contract, being between two of the parties to the original contract, does not vary the case; but where a third person innocent of the usury, takes a new note, it is valid. *Fleming* v. *Milligan*, 2 *McCord R.* 173.

11. It seems even if a part of security be for a valid debt, and part for an usurious transaction, the whole will be infected, and this when separate notes are given. *Ibid.*

12. Where, in consequence of an usurious agreement, a person is procured to endorse the note given in the usurious transaction, although the endorser at the time knew nothing of the usurious transaction, yet his endorsement is usurious and void. *Wilkes* v. *Brumer*, 2 *McCord R.* 178.

13. Where a person borrowed money and gave his note for the amount with lawful interest, and at the same time made a verbal contract to pay five per cent. more, making twelve per cent. interest; the court held, upon an action brought on the note, that it was usurious and void, although it was left to the borrower's honor only, whether he would pay more than legal interest. *Willard* v. *Ruder*, 2 *McCord R.* 369.

14. Defendant applies to plaintiff to borrow money, who has none, but offers him a note for $700 on a third person, whom he understood to have cotton ready to pay it. Defendant accepts it, and gives his own note to plaintiff for $770, payable at the end of the year. *Held*, usury. *Brown* v. *Faussett*. 1 *Harp. R.* 81.

15. Defendant's property being taken in execution at the suit of A B, for $1400, defendant, in order to obtain one month's stay of sale, agreed to pay $100, and gave the note on which the action was brought to the plaintiff, to whom A B was indebted; plaintiff crediting A B with the amount, and he guaranteeing the payment of the note to plaintiff. *Held*, that the note was usurious and void. *Cleveland* v. *Dove*, 1 *Harp. R.* 407.

16. Where usury is set up as a defence to an action, and the plaintiff is called upon by the defendant to swear whether the consideration of the contract was usurious or not, and does swear that it was not

usurious, the defendant cannot introduce other witnesses to contradict the plaintiff. *Fulmer* v. *Hays*, 3 *McCord R.* 256.

17. But the plaintiff may be called upon to prove one fact, and another witness to prove other facts connected with it, all of which taken together may establish the usury which could not be made to appear by any one witness. Usury may sometimes be inferred from a train of circumstances. *Ibid.*

18. Where a note was given for money advanced, to be returned to the drawer when he should pay a debt to which the drawee was security for him, and the drawee endorsed the note and traded it off before it became due, at more than legal interest, it was held not to be void in the hands of an innocent holder. *King & Jones* v. *Johnson*, 3 *McCord R.* 365.

19. Where a note on a legal consideration is drawn to order and endorsed, no matter how often it has been polluted in the hands of intermediate holders, it is still valid in the hands of a *bona fide* holder. *Ibid.*

20. Defendant had passed a promissory note to the plaintiff, at a discount of twelve and a half per cent. per month, for the time it had to run, which note he endorsed; and being sued as endorser, he set up the act against usury in his defence, and held good. *Boisgerad* v. *Forgartu*, *Brev. MS. R.*

21. If the plaintiff shall offer to contradict on oath what the defendant shall offer to swear in support of his plea or defence of usury, he shall be entitled to deny the same on oath, and the defendant shall not be sworn. *Dickson* v. *Baldwin*, *Brev. MS. Reports.*

22. In this case the plaintiff had received as endorsee a promissory note of hand, which had been given for an usurious consideration, (without knowledge of the usury,) and had innocently and ignorantly passed the same away to the defendant, and had received from him another note, on which this suit was brought. It seemed to be the opinion of the court, that this last mentioned note would not be affected by the usurious taint which contaminated the note in place of which it was taken, unless it could be made to appear that the plaintiff had notice of such usurious taint before he took the note in question. *Ibid.*

23. The plaintiff lent to the defendant $300, in United States Bank bills, for which he gave a promissory note, in which it was stipulated, that if it was paid in other than United States Bank bills the defendant should pay the further sum of five per cent. as premium. After the notes fell due, the plaintiff agreed with the defendant to accept other promissory notes in payment, at twelve per cent. discount, computing

the original debt at the sum borrowed, with lawful interest, and the addition of five per cent. premium. The defendant endorsed the notes, and in an action against him on this endorsement, it was held, that neither the reservation of the five per cent. premium, nor the discount of the twelve per cent. on the notes received was usurious, but that the plaintiff was only entitled to the sum originally loaned, with lawful interest, and not the five or twelve per cent. *Brock* v. *Thompson*, 1 *Bailey R.* 322.

24. Where a defendant, in a case of usury, offered to swear under the act to the circumstances of the usury, and for that purpose made a statement of the facts he would swear to, and the plaintiff makes himself a witness under the act, it is not enough that he denies generally the truth of the statement made by the defendant; he must submit to be examined by the defendant, in answer to the facts stated by him. *Murden, Adm'r*, v. *Clifford*, 4 *McCord R.* 65.

25. The court thought the best practice would be to require the defendant to make his statement in writing, and then to examine the plaintiff in answer to the statement under oath. *Ibid.*

26. A defendant who has pleaded usury to a demand against him, cannot take out a commission to have himself examined under the act, on his going out of the state. He must appear in court and give evidence. *Stone* v. *Jones*, 4 *McCord*, 254.

27. The maker of a promissory note, against whom a judgment has been recovered, is a competent witness at common law in a suit by the same plaintiff (the lender) against the endorser, to prove the usury. *Chur.* v. *Kirkly*, 4 *McCord*, 397.

28. The lender can only be a witness under the act where the usury is offered to be proved by the evidence of the borrower, and where the borrower is not a competent witness at the common law. *Ibid.*

29. Though a third person sue upon a contract said to be usurious, and the defendant offers to swear to the usury, the lender, though no party to the suit, may under the act be examined to deny the usury. *Hawk* v. *Jones*, 4 *McCord*, 402.

30. Notes originally founded on a good consideration, though afterwards sold for less than they are nominally worth, do not make a case of usury; but if originally discounted for less than their nominal amount, it is usury. *Ibid.*

31. In an action by the endorsees against the endorser, on a note for $1,875 63, drawn by Brown & Moses, payable to the defendant, and by him endorsed, it appeared from the testimony that Brown, of the firm of Brown & Moses, on or about the 24th of December,

1818, borrowed of William Payne & Son (the plaintiffs) the sum of $3,500, for the use of which for fifteen days he paid $92 50, being at the rate of sixty-five or seventy-five per cent. That some time previous to this, Brown & Moses drew the note now in suit, and it was endorsed by the defendant, as a friendly act to enable Brown to pay for certain merchandise which he had purchased, but was never used for that purpose; and when Brown borrowed the said sum of $3,500, for which he paid usurious interest, he passed away this note with others to the plaintiffs, as collateral security for the loan. The court held the note usurious in its inception, and set aside the verdict for the plaintiffs. The fact of the note in this case having been originally intended for a legal purpose, cannot vary the case, as it was never used for that purpose. It had no legal existence, until passed by Brown to the plaintiffs; no consideration had ever been paid for it; it was, in fact, no more than a *carte blanche* until put in circulation. *Smith's Adm'rs* v. *Payne*, *Rice's Digest*, 37.

32. The court will not declare a contract usurious and void, in favor of him for whose gain the usury was intended, for the purpose of restoring him to rights surrendered in consideration of such usurious consideration. *Miller* v. *Keen*, 1 *Bailey*, 24.

33. If the borrower, after a loan made and without any previous agreement to do so, confess judgment for money lent on usury, he is forever concluded, nor can the endorser of a note made in consideration of such judgment avoid his own liability by reason of usury in the original loan. *Fowler* v. *Henry*, 2 *Bailey*, 54.

34. A note made to raise money, and sent into the market and sold at a usurious discount, is usurious and void; but *bona fide* notes and other securities are subjects of legitimate traffic; and when the endorsee of a note, made to raise money at usurious interest, represents to a purchaser that it is a business note and made for *bona fide* consideration, and the maker is present and acquiesces, it is a fraud upon the purchaser, and they are both liable. *Odell* v. *Cook*, 2 *Bailey*, 59.

35. A creditor compounded with his debtor to receive his bond, with sureties for part of the debt in satisfaction of the whole; but by a private arrangement obtained his individual bond for a further portion of the debt. *Held*, that although the latter bond might be void, as of fraud upon the sureties, it did not invalidate the former bond for usury. *Miller* v. *Read*, 2 *Bailey R.* 345.

36. The act against usury, after fixing a penalty of three times the usurious loan, to be recovered by action of debt, limits the commencement of the action to six months after the offence committed. Defend-

ant lent $100, on usurious interest, and received various sums on account of the loan, more than six months before action brought, and the balance of principal and usurious interest within six months. *Held*, that the plaintiff was entitled to recover three times the amount of the sum originally loaned. *Stewart* v. *Fowler*, *Harper's R.* 403.

37. The plaintiff sold a parcel of cotton to the defendant's intestate, on a credit, and took his note for the amount, but surrendered it when it came to maturity on receiving a new note for the amount, with the addition of usurious interest, for which he stipulated as the condition of further indulgence, and in an action against the defendant on the new note, was defeated on the plea of usury. *Held*, that he was nevertheless entitled to recover in a new action for the price of the cotton. *Chartain* v. *Johnson*, 2 *Bailey*, 574.

38. A subsequent agreement to pay an usurious interest will not avoid a contract which was legal in its inception. *Ibid.*

The repeal by the act of 1830 of that part of the usury act of 1777 which declares usurious contracts to be void, does not set up an usurious contract made before the passage of the act of 1830. *Magwood* v. *Duggan*, 1 *Hill's Rep.* 182.

39. A note given for usurious interest, by the acts of 1777 and 1831 is void, as well in the hands of an innocent holder as between the original parties to it, and usury may be given in evidence under the plea of the general issue. *Gaillard* v. *Seigneur*, 1 *McMullen*, 225.

40. The husband of a *feme sole* trader is a competent witness to prove usury under the act of 1777. *Ibid.*

SECTION XXVIII.

TENNESSEE.

1835—*Chapter* 50.

SECTION 1. All bonds, bills, notes, bills of exchange, liquidated and settled accounts, signed by the parties, shall bear interest from the time they become due, unless it shall be specially expressed that interest is not to accrue until a time specially mentioned in the said writings or securities.

SEC. 2. All bills, bonds and notes made payable on demand, shall be held and deemed to be due on demand made by the creditor, his agent or attorney, by suit or request, and shall bear interest accordingly; and all securities for the payment or delivery of property and all

specific articles, shall bear interest as moneyed contracts; that is to say, the articles shall be rated by a jury at the time they become due, and interest shall be paid by the debtor accordingly: *Provided*, nothing in this act contained, shall be so construed as to prevent a justice of the peace from giving a judgment on any contract for specific articles within his jurisdiction; and all judgments entered up in any of the courts of record in this state, or by any justice of the peace, shall bear interest until paid.

SEC. 3. The legal rate of interest shall be hereafter as heretofore, six per centum per annum, and at that rate for a longer or shorter time.

SEC. 4. Where a greater sum than that prescribed in the third section of this act, is reserved directly or indirectly, and suit is brought for the same, either in a court of record or before a magistrate, against the principal debtor, his securities or accommodation endorsers, the defendant may avoid the excess over legal interest by a plea upon oath, setting forth the amount of usury in the transaction; in case the personal representatives of such obligors or endorsers are sued, they shall only be required to swear that they have good reasons to believe, and do believe, that such plea of usury is true; to such plea the plaintiff may reply upon oath or the oath of the original payee; and the fact shall be decided by a jury where it is denied in the replication; if the original payee shall have died, removed out of the county, or shall refuse to make the affidavit, where the suit is brought by an endorser or holder, the plaintiff shall, on making an affidavit to that effect, and that there was no usury in the transaction to his knowledge, be allowed to file his replication without swearing to the truth of the same; and where the plaintiff is an administrator or executor, no other affidavit shall be required on filing his replication, than that he has no knowledge of there being any usury in the contract.

SEC. 5. Where the plaintiff admits the truth of the plea of usury in his replication, or fails to file such replication with the affidavit required in the foregoing section, judgment shall be given in favor of the plaintiff for the principal and legal interest, and no more; but where the plaintiff does file such replication and affidavits as are above described, then he shall recover the amount claimed, unless the defendant shall prove the usury, in which case it shall be deducted from the claim and judgment given for the balance; yet, if there are other pleas, they shall be disposed of as usual: *Provided*, that nothing in this act shall be so construed as to prevent the party from having relief in a court of equity.

SEC. 6. In any case where more than legal interest shall be taken, the person taking the same shall be liable to indictment or presentment, and on conviction, shall be fined a sum not less than the whole usurious interest so taken and received, which amount shall be ascertained by the jury trying the case: *Provided*, no fine shall be less than ten dollars; and in case the defendant shall plead guilty to the charge, or judgment go against him, on a plea in abatement, a jury shall be sworn to ascertain the amount of interest received as aforesaid, for which judgment shall be entered.

SEC. 7. Nothing in this act contained, shall be so construed as in any manner to affect any charters that may heretofore have been granted by the legislature, and that are now unexpired, allowing the reserving and taking more than the legal rate of interest.

SEC. 8. All laws heretofore in force contrary to this act, are hereby repealed: *Provided*, that contracts heretofore made shall not be affected by the repeal of said laws in any way or manner.

1. A promissory note in which no time of payment is expressed, bears interest from the date. 1 *Tenn.* 110.

2. Interest arising *ex contractu* ought to be demanded as debt; but when it comes by operation of law, it should be demanded by way of damages. *Cooke*, 21.

3. A bill of exchange, drawn by A of Tennessee on B of New Orleans, will carry interest according to the laws of Louisiana. 4 *Yerger*, 452.

4. The custom of New Orleans merchants to charge eight per cent. by way of damages is illegal, and cannot be enforced upon protested bills accepted for the accommodation of the drawers. *Ibid.*

5. The rule for calculating interest where payments have been made, is to calculate interest upon the sum due, up to the time the payment was made, and deduct the payment from the principal and interest at the time, and give interest on the balance until paid. 5 *Yerger*, 310.

6. If one borrow money, and agree that the lender shall have the use of a tract of land for the interest of the money, the value of which exceeds the interest, equity will set off the excess against the amount of money borrowed. 4 *Hay*. 204.

7. A owes B $5,000, and when it becomes due, it is agreed that A shall endorse notes on different individuals.

payment thereof, a per cent. a n

notes had to run, ure anoth

accordingly done. *Held*, that this transaction was usurious, and that the subsequent endorser could take advantage of it. *Martin & Yerger*, 392. 1 *Yerger*, 243. 1 *Yerger*, 444.

8. A contract to pay interest from the date of a note, if it is not punctually paid when it becomes due, is not unlawful or usurious. 1 *Yerger*, 502.

9. A is indebted to B. A loans money at usurious interest to C. B, not knowing of the usury, agreed to receive the note of C (well endorsed) in payment of his debt from A, and C executes his note, which is endorsed and delivered to B. *Held*, that the note was usurious and void in the hands of B. 2 *Yerger*, 350.

10. Where the usurious interest reserved upon a note had, upon each renewal of it, been paid, and the note was re-executed for the original principal: *Held*, that the excess of interest paid on the several renewals might be deducted from the principal and legal interest, and a judgment rendered for the balance. 2 *Yerger*, 255.

11. Where notes are made and endorsed, to be discounted at a greater rate of interest than is allowed by law, they are usurious. 2 *Yerger*, 463.

12. Where one note is given for principal and another note given for the usurious interest, and the note for the usury has been paid off, a court of equity will apply the payment as a credit upon a judgmen obtained on the principal note. 6 *Yerger*, 398.

13. Where the plea of usury is sworn to by the defendant, it is evidence for him, unless replied to by the plaintiff on oath. 1 *Yerger*, 494.

14. A contract, made prior to the act of 1819, ch. 2, which is tainted with usury, is void. *Tolford* v. *Sumner's Ex.* 2 *Yerger*, 255.

15. What is usury or not remains the same, under the act of 1819, as that which was held to be usury under the act of 1741. The only difference is, that under the act of 1819 the security is only avoided for the excess. *Dews* v. *Cartham*, 2 *Yerger*, 463.

16. Where a *certiorari* and *supersedeas* is granted in a case originating before a justice of the peace, and the only defence is usury, the court cannot discharge the *supersedeas* and give judgment for the principal and lawful interest, and retain the case to try the plea of usury. *Offin* v. *Price*, 5 *Yerger*, 285.

17. A, at the request of B, advanced to him $4,000, in Tennessee bank notes; the Tennessee bank notes so advanced run at a discount of twenty-five or thirty per cent. B agreed to pay A the nominal amount of the Tennessee bank notes, at New Orleans, in United

States Bank notes or silver, dollar for dollar: *Held*, that the transaction was a loan, and not a mere exchange of money, and that the contract was usurious. Money paid beyond principal and legal interest on a usurious contract, may be recovered back in a court of equity, at the suit of the borrower against the lender. Neither lapse of time nor the statute of limitations will defeat the right of the borrower to recover back usurious interest paid, when the transaction is a continued one, and new dealings, new advances, new securities for money and mortgages upon property of the borrower are taken and continued to a short time of filing the bill, although the principal part of the usury was paid ten years before filing the bill. It is not necessary, to entitle the complainant to relief in equity, that he should charge in direct terms that the dealing was usurious; if the fact stated in the bill and admitted in the answer, or shown in the proof, make out a case of usury, a court of equity will relieve. *Witherhead* v. *Boyers*, 7 *Yerger*, 545.

SECTION XXIX.

VERMONT.

Revised Statutes of 1839, *page* 366. *Interest of money.*

SECTION 3. No person shall take, directly or indirectly, more than the value of six dollars for the forbearance of one hundred dollars for one year, and at the same rate for a greater or less sum, and for a longer or a shorter time.

SECT. 4. Whenever a greater rate of interest than is allowed by law shall have been paid, the person paying the same may recover back the amount so paid above the legal interest, with interest thereon from the time of payment, in an action of assumpsit, declaring for money had and received or goods sold and delivered as the case may be.

SECT. 5. The foregoing provisions, relating to interest, shall not extend to the letting of cattle or other usages of a like nature among farmers, or maritime contracts, bottomry or course of exchange, as has been customary.

1. It is incorrect to exclude from the jury evidence of the taking even a trifling sum above legal interest, when the defence is usury.

2. Whether taken corruptly or by mistake should be left to the jury.

3. Testimony of a general practice of taking interest at banks according to printed tables, not exactly correct, and that such practice has existed a long time without being resisted, is proper, and may be conclusive to show that the extra interest was not taken corruptly. *Bank of Burlington* v. *Durkee*, 1 *Vermont*, 339.

4. A bank note is not void as usurious, by reason of interest being taken for sixty-four days at the rate of three hundred and sixty-five days to a year, that being a general custom of banks, but the excess must be deducted. *Bank of St. Albans* v. *Stearnes*, 1 *Ver.* 430.

5. A signed a note as surety for O payable to H; and O, in order to secure A for becoming his surety, gave him an absolute bill of sale of a chaise then in the possession of a third person, and of some other property in the possession of O. The whole was left in the same situation as before, no actual delivery or change of possession being made, except that notice of the transfer of the property to A was given to the person holding the chaise, and he agreed to keep it for A. Afterwards the chaise was seized and taken away on an execution in favor of a creditor of O, and A took it from the possession of the officer. In an action of trespass brought by the officer against A for the chaise, it was held, that although the note on which A had become surety, might be usurious and void, yet he was entitled to hold the property assigned to him for his security until he was indemnified or relieved from the note. That the fact of a part of the property being suffered to remain in the possession of the vendor did not defeat the vendee as to the residue, unless the transaction was fraudulent in fact. That the jury were the proper judges, whether from all the circumstances in the case, the sale was merely colorable and made to defeat the right of creditors or was fair and *bona fide*. *Spalding* v. *Austin*, 2 *Ver.* 555.

6. An action brought on the second section of the act to prevent usury by one who was not a party to the usury, to recover a sum of money received by the defendant of a third person contrary to the provisions of said act, is a penal action, and within the provisions of the act requiring the clerk or magistrate signing the writ, to make a minute in writing of the same, of the day, month, and year, when it was signed or exhibited to him. *Hubbell* v. *Gale*, 3 *Ver.* 266.

7. Usury avoids a contract in equity as well as at law.

8. Where a party in a court of equity attempts to enforce an usurious contract, the usury may be set up as a defence.

9. But where a party applies to the court to be relieved from an usurious contract, equity will interfere only on his paying the sum actually due.

10. Where usury is relied on to avoid a contract, it must be fully proved.

11. To a bill of foreclosure, the answer of the defendant setting forth usury in the mortgage as a defence, is not to be taken as evidence for him, unless the plaintiff asks for a disclosure on that subject, but is only equivalent to a plea of the statute of usury.

12. Where a person has assigned a mortgage and notes payable to himself, to raise money for another, and on a bill to foreclose testifies, that he was agent for the mortgagor, and that the contract on which the money was advanced was usurious, the court will not decree that the notes and mortgage are void on his testimony alone, when it appears that he came before the master with a prepared deposition, a part of which had been written by the defendant requesting him so to testify, and when his testimony is at variance in some material points with the testimony of other witnesses, although his general character is unimpeached. *McDaniels* v. *Barnum*, 5 *Ver.* 279.

13. That a demurrer to a discovery of usury charged in a bill must be allowed, unless the person demurring waives the forfeiture, and seeks only to be relieved against the usurious part. 5 *Ver.* 39.

14. That the court will not admit a plea of usury presented out of time without a waiver of the forfeiture. *Ibid.*

15. A *bona fide* debt or demand contracted upon a legal consideration is not lost or destroyed, by being mingled with a usurious transaction or being made in whole or in part the consideration of a usurious contract.

16. Where a note not tainted with usury has been given up and cancelled, on being made the consideration of a usurious contract or note, which latter has been avoided as usurious: *Held*, that the note cancelled on the consideration of this may be recovered, and evidence of the note or consideration be received under the money counts of the declaration. *Edgell* v. *Stanford*, 6 *Vermont*, 551.

17. A promissory note containing an usurious excess of interest was executed while the usury act of 1797 remained in force; and after the act of 1822 came into operation, the note was given up and another taken for the amount, without any new agreement respecting interest. *Held*, that the last note was not wholly void, but subject to apportionment on the principle of the former statute. *Dunbar* v. *Wood*, 6 *Vermont*, 653.

18. Where the maker of a note infected with usury, in consideration that the holder should cancel or discharge the same, promises to give a new note, deducting the usurious excess, such promise will be enforced in law. *McClure* v. *Williams*, 7 *Ver.* 210.

19. Sheep or cattle let pursuant to the custom or usage of farmers is not usury, although the risk of the life of the animals be by the contract on the hirer, if such be the usage. *Whipple* v. *Powers*, 6 *Vermont*, 457.

20. If money be loaned and by fiction be called sheep or cattle, or if there be any color or fiction to bring the loan within the provisions of the statute, it is usurious.

21. The giving up a sheep or cattle contract without the same being paid, and taking another therefor fictitiously pretending to let cattle where none in fact existed, is usurious. *Ibid.*

22. If the defendant, in a suit in chancery brought to foreclose a mortgage appears, claims that there is usury in the sum secured by the condition, has the same stricken out by the master in his report of the sum due, a decree passes for the sum actually due, and the orator takes possession of the premises mortgaged; he cannot maintain an action of ejectment against the orator in the bill or those claiming under him, on the ground that the mortgage was void on account of the usury. *Rubble* v. *Chaffer et al.*, 8 *Vermont* 111.

23. In a suit in the name of common informer to recover the penalty in the statute against usury, it must appear that the payment of money or other thing sought to be recovered was a voluntary payment, and made in pursuance of a previous corrupt agreement.

24. A decree of the county court in an action of ejectment predicated on mortgage even after it becomes absolute, and so the debt is paid, does not constitute such payment as will enable the mortgagor or a common informer to recover the excess of lawful interest included in such decree.

25. By such decree it would seem that the usury is purged, and no subsequent proceedings can be had whereby the question of usury shall be again brought into discussion. If the contracting party never had a right of recovery under that statute, no action can accrue to a common informer. *Steward* v. *Downer*, 8 *Vermont*, 320.

26. Where an agent authorized to settle the debt due the estate takes a note to the administrator for the principal sum due, and one to himself for usurious interest, the first note is not void unless the administrator knew of the usury, and assented to it. *Baxter Adm.* v. *Burk*, 10 *Vermont*, 548.

27. An act of the legislature of Massachusetts provided that usury reserved in a contract should not render the contract void, but that the defendant might by plea set forth the usury, and if proved bar the plaintiff from a recovery, except for the balance of his demand after

deducting treble the amount of the whole interest reserved, and that the defendant should recover his costs. In an action brought in the courts of this state upon a contract made in Massachusetts, it was held that this statute related to the remedy, and could have no operation in this state; and that a plea founded upon this statute could not avail the party, and was insufficient as a partial bar of the action. *Suffolk Bank* v. *Kidder*, 12 *Ver.* 464.

SECTION XXX.

VIRGINIA.

An act to reduce into one act the several acts against usury. Passed February 24, 1819.

SECTION 1. *Be it enacted by the General Assembly*, That no person shall, upon any contract, take, directly or indirectly, for loan of any money, wares, or merchandise, or other commodity, above the value of six dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts, covenants, conveyances, or assurances, to be made, for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken, than is hereby allowed, shall be utterly void.

SECT. 2. If any person shall, by any way or means of any corrupt bargain, loan, exchange, shift, covin, device, or deceit, take, accept, or receive, for the loan of, or giving day of payment for, money, wares, merchandise, or other commodity, above the rate of six dollars for one hundred dollars for one year, every person so offending shall forfeit double the value of the money, wares, merchandise, or commodity, so lent, exchanged, or shifted; one moiety to the use of the Commonwealth, and the other to the informer, to be recovered with costs.

SECT. 3. Any borrower of money, or goods, may exhibit a bill in chancery against the lender, and compel him to discover, upon oath, the money or thing really lent, and all bargains, contracts, or shifts, which shall have passed between them, relative to such loan, or the repayment thereof, and the interest or consideration for the same; and if, thereupon, it shall appear, that more than lawful interest was reserved, the lender shall be obliged to accept his principal money without any interest or other consideration, and pay costs, but shall be discharged from all other penalties of this act.

SECT. 4. Every broker, solicitor, or driver of bargains, who shall hereafter, directly or indirectly, take or receive more than the rate or value of twenty-five cents, for brokerage, or soliciting the loan or forbearance of one hundred dollars for a year, or above seventeen cents for making or renewing the bond or bill, for such loan or forbearance, or for any counter bond or bill, concerning the same, shall forfeit, for every offence, sixty-six dollars and sixty-six cents, to the Commonwealth and informer, to be recovered and divided, as hereinbefore mentioned.

SECT. 5. All acts and parts of acts, coming within the purview of this act, shall be, and the same are hereby repealed: *Provided*, That all rights, remedies, penalties, forfeitures, actions, and prosecutions, heretofore accrued, incurred, or commenced, shall be and remain in the same condition, as if this act had never been passed.

SECT. 6. This act shall commence and be in force from and after the first day of January, eighteen hundred and twenty.

1. In June, 1764, McGuire mortgaged a tract of land in Virginia to Parker, then a resident of Philadelphia, for the purpose of securing the payment of £88 12*s*. 6½*d*. Pennsylvania currency, with lawful interest thereon from the 5th day of March preceding. In 1773, Warden Exec. of Parker instituted a suit in chancery in the county of Frederick to foreclose the mortgage. McGuire, in his answer, admitted the execution of the mortgage; and that £88 12*s*. 6½*d*. Pennsylvania currency, with interest at the rate of five per cent. per annum from 6th March, 1764, was due and unpaid; but that Peter Hogg, the attorney of mortgagee had agreed that the sale of the mortgaged premises should be respited until first Tuesday in August, 1775. McGuire consented that a decree conformable to this agreement should be pronounced. The cause was heard in September, 1773, by consent of parties, by their counsel on bill and answer; and a decree was made that McGuire should, on or before the 10th September, 1775, pay to the mortgagee £70 18*s*. 5*d*. Virginia currency, with interest thereon at the rate of six per cent. per annum, from 6th March, 1764, or that in case of failure, the sheriff should sell. *Held*, if the change in the rate of interest were made from a consciousness in the parties, that the debt originated in a contract made in Pennsylvania, it was lawful and just that the decree should be for six per cent. If, on the contrary, the interest was increased with a view to procure the two years indulgence, it would have been usurious and void. The court presumes the former: The court will never presume a contract to be usurious

unless it be proved. We consider the decree for six per cent. to have been entered into by consent. *McGuire* v. *Warden, Ex'r of Parker.* 1 *Wash.* 368.

2. When a bill in equity is filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity to plead the usury at law, and prays for *no discovery;* but on the contrary, is ready to prove the fact, the court ought not to grant him relief against the usury upon the condition of his paying the principal sum of money, (without interest,) but should altogether enjoin the trustee from selling, until, by some proper proceeding to be instituted by *cestui que trust*, he establishes the validity of his contract; in which case the injunction should be dissolved, and in the contrary event perpetuated.

Upon the result of such proceeding, if the injunction be dissolved, the deed (being then cleansed of its usurious taint by the judgment of a competent tribunal) should be enforced as a security to compel the payment of a debt. *Marks* v. *Morris*, 2 *Mun.* 407.

3. If a bond be given without any consideration, but to be used as an article of traffic to raise money, the *bona fide* purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount. A fair purchase of a bond at any discount is not usurious. See 2 *H. & M.* 14. 1 *Dall.* 217. 2 *Dall.* 92. 2 *Munf.* 36.

4. T being indebted to H in the sum of £1,200, payable by equal instalments in little more than three years, an agreement took place between T and W, that W, in consideration of £800 cash, paid him by T, should exonerate T from his debt to H. This agreement is usurious and void, notwithstanding W might have reaped advantage from it by buying the bonds of H at a discount, or by selling him tobacco at a high price. If the agreement in this case had been, that W was to pay the debt *in the bonds of H, if to be had, and not otherwise;* it seems that, since the principal sum of £800 would have been in jeopardy, the contract would not have been usurious and void.

But here it appeared that though W was to be at liberty to pay the debt in the bonds of H, yet he was to be responsible *at all events*, whether he could get such bonds or not. This made it usurious. *Watkins* v. *Taylor*, 2 *Munf.* 424.

5. A continuance ought not to be granted at law, on the ground that the party, a *few* days before that appointed for the trial, filed a bill in equity for discovery of usury, as auxiliary to his defence at law; unless he make affidavit that the usury therein charged had *recently* come to his knowledge. *Ross* v. *Newell*, 3 *Munf.* 170.

6. The plea of the statute against usury, ought to be received in a court of equity at any time before the decree is final, if there be strong reasons from the statement in the bill for believing that the matter of such plea may be true. If the party tendering such plea has been improvidently allowed to file a bill of review, which has therefore been dismissed at his costs, it is unreasonable to require him to pay those costs in a limited time as the condition of receiving his plea. Where a bill of review has been dismissed on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill is not authorized, in his subsequent defence, to make use of the answer to the bill of review as evidence in his favor. *Ellzy* v. *Lane*, 4 *Munf.* 66.

7. If a bond for usurious interest be taken, in consideration of forbearance to bring suit on a previous bond which, in its origin, was free from objection; it is competent for the obligor to obtain relief in equity against the obligee, by having such usurious bond cancelled or credit given him for the amount of the principal and interest due thereon, against the original bond, *and this right is not lost by the assignment of either of the bonds.* On a bill of injunction against the assignee in such case, the obligee being also a defendant, the court ought not to decree that the injunction be dissolved, and the bill dismissed as to the assignee, and that the obligee pay the complainant the amount of such usurious bond; but should appoint a reasonable time for the obligee to produce to the complainant the bond for the usurious interest or a satisfactory acquittance therefor; and in that event should dissolve the injunction, or (if he do not produce such bond or acquittance) should make it perpetual as to so much; and in the last event a further decree should be made, that the *obligee* pay to the assignee the sum for which the injunction is made perpetual.

8. And if a decree dismissing the bill be reversed, and the injunction ordered to be reinstated, the court reversing such decree should moreover direct, that if it shall appear the whole amount of the judgment has been coerced from the complainant by the assignee, such further decree shall not be entered in favor of the *assignee*, but of the complainant. *Fox* v. *Taliaferri*, 4 *Munf.* 243.

9. A contract for the sale of $6,000, U. S. eight per cent. stock, to be delivered and regularly transferred on a future day, for $6,000, current money, in hand paid, is not usurious. *Bull* v. *Douglass*, 4 *Munf.* 303.

10. That slaves were sold on a credit for more than a sum which the seller had previously offered to take for them in cash, with interest

thereon, during the term of credit, and that the seller was accustomed to lend money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury; there being no proof that a loan of money was intended by the parties. *West* v. *Belcher*, 5 *Munf.* 187.

11. Where a party applies to a court of equity to be relieved, on the ground of usury, and does not call upon the defendant for a discovery, but proves his case by evidence *aliunde;* quere, whether he can be only relieved to the amount of the usurious interest upon paying the principal, with lawful interest, or shall he be relieved from the debt in *toto.*

Quere. What shall be considered a bill for a discovery? *McPherson* v. *King*, 1 *Randolph*, 172.

12. A tacit understanding between borrower and lender, formed on a known practice of the latter, to lend money at a legal interest, if the borrower purchased of him a horse at an unreasonable price, is a shift to evade the statute against usury.

13. Where a court of chancery has doubts whether the sale of a house or other property is really intended as a shift to evade the statute against usury, it ought to direct an issue to be tried upon *viva voce* testimony, if to be had. *Douglass* v. *McChesney*, 2 *Randolph*, 109.

14. To constitute usury, there must be an intention to take more than legal interest. The mistake of a scrivener in putting one sum for another, will not charge a party with usury.

If a mode of calculating interest, which gives to the creditor more than legal interest, is adopted, and the creditor knows it will have that effect, he is guilty of usury, although he may not suspect that he is violating the law. *Childers* v. *Dean*, 4 *Randolph*, 406.

15. In all cases where a party applies to a court of equity for relief against an usurious contract, whether he alleges in his bill that he is able to prove the usury without the defendant's confession or not, he can only be relieved upon paying the principal, *without interest*, under the third section of our (Vir.) act of assembly. *Young* v. *Scott*, 4 *Randolph*, 415. A note is made and endorsed for the accommodation of the payee, and afterwards put into the hands of a broker by the payee, to be sold in the market. It is purchased of the broker by a person who has no knowledge that it is accommodation paper, or for whose benefit it is sold. This transaction is not usurious.

16. An intermediate endorser of a valid note for an usurious consideration, as between endorser and endorsee, will not vitiate the note in the hands of a subsequent *bona fide* holder, without notice of the usury.

17. A note, valid in its inception, if afterwards *endorsed* by a party to whom it has regularly come, to a third person at a *greater discount than legal interest*, such transaction is usurious. *Whitmarth* v. *Young*, 5 *Randolph*, 333.

18. The law of usury applies to banks, subject to the modification produced by their charters.

19. Where the facts are agreed or found by the jury, it is the province of the court to say, whether the transaction amounts to usury or not.

20. Where a proposition is made for a loan of money, and the lender will only consent to lend a part of the money wanted, on condition that the borrower shall receive stock at a price much above the market value, to make up the deficiency, and the bargain is made on these terms, such contract is usurious.

21. A loan on accommodation paper, and a discount on real paper, stand on the same footing as to the right of a bank to deduct the interest in advance on the whole amount of the note. *Stribling* v. *Bank of Valley*, 5 *Randolph*, 132.

22. If to a bill brought to foreclose a mortgage the defendant pleads usury, and the bill itself on its face, and the documents filed with it, present a case of usury, such as is pleaded, it is not necessary for the defendant to take depositions to support his plea. His adversary's bill supports his plea. *Lane* v. *Ellzy*, 6 *Randolph*, 661.

23. A, being indebted by bond to B in £445 11s. 2d. sterling, on the 17th December, 1787, assigns him C's bond for £780, currency, at the agreed value of £382 10s. 2d. sterling, and gives a new bond, with two sureties, for the balance of £106 17s. 2d. sterling, payable in March following; this is usury.

In such case it is sufficient, if the verdict finds facts amounting to usury, though it does not find the corrupt agreement in technical words. *Gibson* v. *Trutoe*, 1 *Call's R.* 54.

24. An agreement by which a man secures to himself, directly or indirectly, a higher premium than legal interest for the loan of money, or the forbearance of a debt due, is usury. *Ibid.*

25. *In Villers* v. *Corey*, 6 *Mod.* 303, it is held, that if there be a just debt due, and a bond given for it with unlawful interest, it is usury, and the same principle may be collected from 12 *Mod.* 385. I hold it to be a clear principle, that a corrupt forbearance of money then due, is as much within the statute as an original loan; and that, within the meaning of the statute, is a loan. *Musgrave* v. *Gibbs*, 1 *Dallas*, 226.

26. In order to constitute usury, both parties must be consenting to the unlawful interest; that is to say, the lender to ask and the borrower to give. Therefore, if a bill of exchange is drawn upon an obscure man in *Scotland*, although the payee may expect it will be protested, yet if there was no agreement between him and the drawer, that it should be protested, the transaction is not usurious. There must be proof of a lending and borrowing to constitute usury. *Price* v. *Campbell*, 2 *Call*, 111, 2*d ed.* 92.

27. An agreement to set the profits of a mortgaged subject against the interest of the money lent, is usurious, if they exceed the legal rate of interest. *Robertson* v. *Wheeler*, 2 *Call*, 421, 2*d ed.* 354.

28. If a bond bear more than legal interest, and for that reason be deemed usurious in a court of law, equity will relieve against the judgment, and decree just compensation, if the transaction be fair. *Braxter* v. *Willing*, 4 *Call*, 288.

29. If A, indebted to C, wishes to borrow money of B to pay C, and B supposing he had money in Scotland, agrees with A to draw for it in favor of C, provided C will endorse the bill of A, and does endorse it, and takes B's bill, which is afterwards protested; C may recover of A, upon A's bill, for the transaction was not usurious, and a tender by A of paper money to B was of no avail. 4 *Call*, 402.

30. If A propose to B, that B should buy his land, which was advertised to be sold under a deed of trust for the amount of the creditor's debt, and should let A have it again, upon payment of principal and interest at the end of twelve months; instead of which, they enter into an agreement that B should bid the creditor's debt for the land, and if it was struck off to him, that he should resell it to A, sum thereafter to be agreed upon, provided it was paid within twelve months; which sum, though never agreed on, was understood to be such as would reimburse B the money paid, the sacrifice he might make to obtain it, and liberally compensate him for his trouble; it is not usury. And if the money is not paid to B, &c., within the twelve months, nor the sum fixed, the purchase is absolute. *Jones* v. *Hubbard*, 5 *Call*, 211.

31. Negotiable notes made by H & H, endorsed by A, for the accommodation of H & H, to be sold in market, purchased by B from a broker, who sells them for H & H at a greater discount than six per cent., are not usurious in the hands of B without proof that B knew the fact. (*Quere.*) 1 *Gilmer*, 42.

32. The first statute of Virginia, on the subject of usury, was made 1730, and founded on the 21 of James I. The same words are reiterated in act of 1734 and 1748.

33. In Marsh *v.* Martindale, 3 Bos. & Pul. 159, the jury expressly found that the plaintiff was clear of any intention to violate the law. But Lord Alvanly says, that an agreement to take more than five per cent. is a corrupt agreement within the meaning of the act, whether the party thinks he acts contrary to the statute or not, and that the agreement in that case was corrupt, whatever was the intention.

34. It is not usurious, upon a settlement of accounts, to take a bond or note for the balance due including interest, and to receive interest on such bond or note. *Brown* v. *Bunt*, 1 *Hen. & Munf.* 4.

35. The sale of a bond for much less than its nominal amount, is not of itself usurious.

36. A bond given in the alternative to pay a specified sum of money, or such further sum as would be sufficient to purchase as much property as such specified sum would purchase at a period antecedent to the date of the bond, held not to be usurious. 2 *Hen. & Munf.* 550.

37. J B, being indebted to certain British merchants, conveyed a tract of land and sundry slaves in trust, to secure the payment of the debt, in three equal annual instalments, with interest from the date of the deed of trust, the payment to be made in tobacco, to be delivered at, and addressed to them in London, on which they were to draw the usual accustomed mercantile commission of 21s. sterling, for each hogshead actually shipped. And it was further provided, that in case of *non*-shipment of the tobacco, *a further sum equivalent to, and in lieu of the usual accustomed mercantile commission thereon*, at the rate of 21s. sterling per hogshead, estimating each hogshead to be worth £10 sterling, was to be added to each payment: *Held*, that the transaction was usurious, and the deed of trust void. *Dunbar* v. *Long*, 4 *Hen. & Munf.* 212.

38. In cases of usury, the borrower filing his bill in equity, is entitled to relief, not against the contract entirely, but to the amount of all but the principal money; the lender being entitled to receive his principal without any interest. In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal, and the court will direct them to be enforced to that extent, if it be not paid by a given day. *Marks* v. *Morris*, 4 *Hen. & Munf.* 463.

39. It is not usury to sell bank stock at a very high price; since, to constitute usury, there must be a treaty for the loan or forbearance of money. 4 *Hen. & Munf.* 490.

40. A defendant may plead to a *scire facias* brought to revive a

decree, which was obtained against him by default, that the original contract was usurious. *Lane* v. *Ellzy*, 4 *Hen. & Munf.* 504.

41. C, wanting to raise $2,335, tells J this, and offers him as many slaves as will command that sum; upon which J pays him $2,335, in gross, for sixteen slaves, and C gives him a bill of sale thereof: and it is at the same time agreed that the slaves shall remain in C's possession, on hire for one year; and if at the end of the year C shall pay J $2,935, J shall, in consideration thereof, resell the slaves to him. If any of the slaves die during the year, C to pay same price and no less for survivors; and if C shall not pay the $2,935 punctually, J's agreement to resell to him to be void: *Held*, a shift to evade the statute of usury, and contract usurious.

42. C, contracting usurious debt to G, gives him a deed of trust of slaves to secure it; afterwards C voluntarily surrenders trust slaves to trustee, to be sold to satisfy the debt; at trustee's sale, *in itself fair*, G buys greater part of trust slaves, and the proceeds of sales are applied to the debt: *Held*, though deed of trust usurious, yet trustee's sale of the subject to G, the usurious creditor, shall not be disturbed in equity. Though where one resorts to equity for relief against usurious debt, yet *unpaid*, he shall be required to pay only the principal advanced to him, *without even lawful interest*, according to the statute of Virginia; yet where debtor seeks in equity an account of and decree for money *already* paid, on usurious contract, the measure of relief is the excess paid above principal and lawful interest; and if his payments exceed principal and lawful interest, the surplus and interest shall be decreed to him. *Clark* v. *Garland*, 1 *Leigh*, 147.

In a bill for relief against usury plaintiff charges usury exacted at a rate of two and a half or three per cent. per month: defendant, in his answer, admits he exacted usury, but says he does not remember the rate; and there is no proof to ascertain the rate: *Held*, that in this state of the case, the court should consider the rate of usury two and a half per cent. per month. *Fulcher* v. *Baker*, 1 *Leigh*, 453.

43. M borrows money of L, on usury, and by deed of trust conveys land to a trustee, with power to sell the subject when required after debt should fall due, and raise money to pay it; the lender dies, his administrators require trustee to sell trust subject; the borrower exhibits a bill in chancery charging the usury, requiring defendants to answer the charge; insisting that the deed of trust is null and void, and praying injunction to restrain trustee from selling; the administrators of the lender and the trustee disclaim all knowledge of the usury; but the usury is proved by one witness: *Held*, that in such case the

court of chancery should enjoin the trustee from selling the trust subject, till the creditors claiming under it should establish its legal validity in some proper forum, where the debtor may have an opportunity to contest it. *Martin* v. *Lindsey*, 1 *Leigh*, 499.

Same case again discussed in 2 *Leigh*, 626.

44. Question, whether under the circumstances of the transactions, a sale of bank stock upon a credit at par, the cash value of the stock at the time of sale being twenty per cent. below par, was a *bona fide* sale, or an usurious transaction under cover of a pretended sale?

45. S, being under urgent necessity to raise a sum of money, requests M to assist his agent in negotiating a loan thereof at a bank; M lends his assistance, but the bank refuses to lend the money. Then M proposes to S to sell him bank stock at par, upon credit, the stock being then twenty per cent. below par in the market; and M enters into a negotiation with the bank to borrow the money S wanted, for S, upon a pledge of the stock. The bank offers to lend the money upon a pledge of the stock *and* S's note endorsed by M; and M, having thus settled the terms of the loan with the bank, sells his stock to S at par, on a credit, and immediately the bank lends S a sum equal to four-fifths of the par value of the stock, on a pledge of the stock *and* S's note endorsed by M: *Held*, this is a fair sale of bank stock by M to S, and not a device to cover a usurious loan of money. *Siby* v. *Morgan*, 3 *Leigh*, 577.

46. T & N, being indebted to the bank, and the bank having recovered judgment against them for the debts, and the debtors applying to the bank for indulgence, the bank agrees to give them a long indulgence, upon their agreeing to give real security for the debt, and moreover to pay the attorney of the bank all the costs of the suits, and the *commission* which the bank had agreed to give him for collecting and securing the debt. The debtors give the real security for the debt, and one of them pays the *costs* and part of the *commissions* of the attorney, and his executor gives the attorney his note for the balance of the commissions; the attorney having full notice of the terms of the agreement between the bank and the debtors: *Held*, the agreement between the bank and the debtors, and therefore the note for the commissions to the attorney, were usurious. Decree between co-defendants refused under the circumstances. *Toole* v. *Stephen*, 4 *Leigh*, 581.

47. The Farmers' Bank discounted a note for $6,000, payable on its face sixty days after date, for the accommodation of the maker; it was understood that the accommodation would be continued indefi-

nitely, till it should suit the interest or convenience of the bank or of the party to discontinue it, the bank reserving a right to discontinue at its own discretion or pleasure, and the party also having a right to discontinue it at pleasure, and for the purpose of so discontinuing it the note should be renewed from time to time. The accommodation was in fact so continued upon such renewed notes from the 21st of April, 1825, to the 4th of May, 1826; the bank, in discounting the first note, deducted and retained to itself the interest for sixty-four days, i. e. for the time the note had to run, including the days of grace, counting the interest from the day of the date to the last day of grace, both inclusive; and in discounting the *second* note, made on the last day of grace of the first, deducted and retained to itself the interest for sixty-four days, counting from the day of the date of the *second* and last day of grace of the *first* to the last day of grace of the second note, both inclusive; and so on, upon each renewed note successively, to the end of the transaction; so that the bank received, in fact, double interest for every sixty-fourth day; and this was in conformity of the known usage of the bank, and of all the banks of Virginia: *Held*, the transaction was in nowise usurious. *Breckenbridge, Justice, dissenting. Trump* v. *Nicholas*, 6 *Leigh*, 251.

48. Though where one resorts to equity for relief against a usurious debt *not yet paid*, he shall be required to pay only the principal advanced to him *without even* legal interest, according to the third section of the statute of Virginia, yet where the debtor seeks in equity an account of, and decree for money *already paid* on a usurious contract, the measure of relief is the excess paid above principal and legal interest; the surplus with interest shall be decreed to him.

49. A mortgages land to B, and then executes a deed of trust to secure another debt to C. A bill in chancery is filed by B against A, to foreclose the mortgage, and A resists the foreclosure on the ground that the debt secured by the mortgage is usurious; pending this suit the land is sold under the deed of trust for the debt due to C, and C becomes the purchaser for the amount due to him, the land being so sold by the trustee to C, subject to B's mortgage, A the mortgagor being present and admitting that the mortgage debt was to be paid, and C having no notice of B's mortgage being usurious, C takes possession and afterwards sells the land to B the mortgagee. Many years after, and after B's death, the suit brought by B against A to foreclose the mortgage is dismissed by B's representatives. Upon a bill brought by A to set aside the sale to B and to redeem the mortgage: *Held*, 1, The sale shall not be set aside; and 2, as C pur-

chased subject to B's mortgage, and then sold to B, the sale to B was in effect a payment of the debt due on A's mortgage to B; so that though the mortgage debt was usurious, yet having been thus paid, A is entitled only to the excess above principal and legal interest, with interest on such excess. *Spengler* v. *Snapp*, 5 *Leigh*, 478.

50. A debtor owing a debt due, agrees to give the creditor his bond for it payable at a future day, and to add to the debt and insert in the bond a sum equal to five per cent. on the debt, to cover commission, which the creditor might be compelled to pay an agent for collection; and the bond is given accordingly for the aggregate, including the commission, with a verbal agreement that if the debtor should pay the debt punctually, he should be exempted from the payment of the sum inserted in the bond for commission for collection. In debt on the bond and issue joined on the plea of usury; *Held*, 1. Parol evidence is admissible to prove the verbal agreement as to the sum allowed for commission. 2. The contract is not usurious, since the debtor might, by punctual payment of the debt, relieve himself from payment of the sum he contracted for commission. 3. The creditor stipulating that the debtor should pay the commission which would be incurred in the collection, in default of punctual payment, if made in good faith to cover such commission, and not as a device to evade the statute of usury, was, in point of law, not usurious; and the court ought so to direct the jury; leaving the jury the question of fact whether the contract for commission was made in good faith, or was an evasion of the statute. *Campbell* v *Shields*, 6 *Leigh*, 517.

51. A proposition is made by S to the directors of the bank that *he* would purchase one hundred shares of the stock of the bank of $100 each at par, and that the bank should discount for him a note of $8,000 on a pledge of the stock at $80 the share, upon the faith of the expectation, that if the proposition should be acceded to, the bank would discount for him another note of $2,000 on the personal security of endorsers, so as to make up the sum of $10,000, which he said he was desirous to raise for his present exigencies; and upon condition that the bank should not call upon him for the money for eighteen months—to which the directors of the bank answer, that they will sell him one hundred shares of stock at par, for the price whereof, they will receive and discount his note for $10,000, secured not by a pledge of the stock, but by other persons joining him as makers of the note and an endorser, the note to be regularly renewed every sixty days and the discounts paid according to the custom of the bank for and during the term of eighteen months; and also that

S should have a loan of $2,500 for the same term of eighteen months, and on the same terms. And to these terms S assents, and the notes are accordingly made and discounted; S and the directors both knowing that the utmost value of the stock in the market at the time was but $80 the share. *Held*, this was a sale of stock, at an exorbitant price, coupled with a loan of money arising out of a proposition to borrow money; the sale and the loan one entire contract inseparably connected with each other, and the one dependent on the other; and the transaction, and S's notes made and discounted by the bank in pursuance of the agreement, were usurious. *Bank of Valley* v. *Stribling*, 7 *Leigh*, 26.

52. A contract to take, for the loan of one hundred and forty-two shares of bank stock for a year, thirty additional shares, is not void under the statute of usury; for the one hundred and forty-two shares to be returned, may not, at the time of returning them, be of any greater value than the one hundred and forty-two shares received, at the time of receiving them, with the dividends or interest added. *Steptoe* v. *Harvey*, 7 *Leigh*, 501. (Sed quere. If payable in *genere* and not in *specie*.)

53. It is settled in Virginia, that the taking the discount in advance upon discounting a note at a bank is not usurious, and that the including the day of payment of the first note in the second note, whereby the bank receives under each note interest for the same day, is not usury.

54. The State Bank of N. C. discounted a note made by the defendants, in renewal of which other notes were afterwards, from time to time, made and discounted; and it was found, by a special verdict, that the bank was in the habit of using, in its calculations of interest, Rowlett's tables, which consider three hundred and sixty days as a year, instead of three hundred and sixty-five days, the effect of which is to make the interest for every fraction of a year somewhat more than at the rate of six per cent. per annum. *Held*, this mode of calculating interest does not make the transaction usurious.

55. At a time when the State Bank of N. C. had suspended specie payments, the defendant offered to the bank a note for discount, accompanied by an offer in case his note should be discounted to exchange an equal amount of northern funds for N. C. bank notes. A bill was accordingly drawn upon a firm in Virginia at ninety days, and the same being accepted, the bill and note were both discounted, with a further condition annexed to the note, that it should be paid in Virginia *or other northern bank notes*. The bank paid for the bill

and note in its own notes in part, and in part in the notes of other banks in N. C., all of which were at the time under par in Raleigh, from three and a half to four and a half per cent. At the time of the discount, suits were depending against the bank upon its notes to coerce payment of them. The notes received by the defendant were, in the presence of the president and cashier of the bank, handed over to the acceptor to meet his acceptance with them, and then pay the balance to the defendant; the president and cashier knowing the loss to which the defendant would be subjected. The notes were sold in Virginia at a loss of from two and a half to three and a half per cent. and the bill paid at maturity in Virginia or United States Bank notes. These notes were at par at the time of the discount, and the president and directors of the N. C. bank knew at the time that their notes were not of equal value. *Held*, notwithstanding, the transaction was not usurious. *Dissent*, Tucker, president. *State Bank of N. C.* v. *Cowan*, 8 *Leigh*, 238. Upon the principle that there was some contingency, as *other northern funds* might be of Philadelphia, New York or Boston at three or four per cent. below par, and the bank in such case might not receive more than six per cent. after all.

56. Where usury is relied on by a defendant in equity to defeat a plaintiff's whole claim, the facts constituting the usury must be distinctly alleged, and clearly proved according to the allegation, but it is not necessary to allege them with the formal strictness of a plea of usury at law. Case in which the defence of usury was held to be well made in the answer.

57. Where, upon a loan of money, the lender besides his principal contracts to receive, in lieu of interest, something which *may* be worth more than six per cent. per annum, though it may perhaps prove to be worth less, as the dividends on bank stock; the contract is usurious.

58. A debtor owing a certain number of shares of bank stock, agrees with his creditor to pay him, at a future day, the market price of the stock on that day, or $150 per share, at the creditor's option, with the dividends. Held, the contract is usurious.

59. A party may lawfully lend stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to pay it in one way or the other. But he cannot legally reserve to himself to determine in future which it shall be. *Smith* v. *Nichols*, 8 *Leigh*, 330.

60. A borrower at usurious interest, having executed a bond and deed of trust to secure the repayment of the loan, files a bill in equity

against the lender and the trustee, alleging the usury, and that the trustee is about to sell the property conveyed to raise the amount of the bond; and praying that the defendant may be compelled to answer all the allegations of the bill, that the sale by the trustee may be enjoined, the trust property reconveyed to the plaintiff, the bond delivered up *on such terms and conditions as are equitable*, and that *such other and further relief* may be granted to plaintiff *as is agreeable to equity and the nature of his case. Held*, though the borrower might have elected to ask merely the opportunity of trying the question of usury at law, yet, as by the terms of the bill, he has sought full relief in equity, he shall only be relieved on the terms of paying the principal money due. On a bill in equity for relief against a usurious debt unpaid, whether the usury be confessed in the answer, or proved by the evidence, the plaintiff shall be relieved on payment of the principal justly due without interest. *Dissent, Brooke, J.*, who held that where usury is not discovered in the answer, but proved *aliunde*, the case is not within the 3d section of the statute against usury, (1 Rev. Code, ch. 102,) and the plaintiff should therefore be compelled to pay the principal with legal interest.

62. Quere, whether a bond executed in Virginia for money borrowed in Pennsylvania, is to be deemed a Virginia contract or a contract made with reference to the law of Pennsylvania, and to be governed by that law? It seems it is a Virginia contract.

63. A contract entered into in another state, in violation of the usury law of that state, cannot be considered as made with reference to the law of the place of contract; but the rights of the contracting parties, if litigated in this state, must be determined by our own law. *Turpin* v. *Povall*, 8 *Leigh*, 93.

64. B represents to A that he had been desirous of purchasing C's land, but had not done so from inability to advance funds as speedily as C required, and that he wishes A to buy the land, and let him have it; whereupon it is agreed that A will buy the land as cheap as he can, and that B will pay him $900 for it. A makes the purchase at $750, and the land is conveyed to B, who gives his note to A for the $900. *Held*, the transaction between A and B is free from objection on the ground of usury. 9 *Leigh*, 556.

SECTION XXXI.

WISCONSIN.

Passed at the session of November, 1838.

SECTION 1. That any rate of interest which persons may agree upon not exceeding twelve per centum per annum, shall be legal and valid: *Provided*, that upon all bills of exchange, promissory notes, contracts, debts, or demands, wherein the rate of interest is not otherwise specified, it shall be computed at seven dollars, for the giving day of payment on the sum of one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time: *Provided further*, that no bank or corporation, except where it is otherwise provided by their charters, shall recover or take directly or indirectly, more than seven per cent. interest for any sum or sums of money loaned.

SECT. 2. If a person or corporation shall take, accept, or receive, for giving day of payment, upon any bill of exchange, promissory note, contract, debt, or demand, a greater rate of interest than is herein before limited, such person or corporation shall forfeit three times the amount of the excess, to be recovered with costs of suit, in the name of the person or persons so paying any excess of interest, in an action of assumpsit, before any court having competent jurisdiction: *Provided* that the suit is commenced within one year from the day of payment of such excess of interest.

SECT. 3. This act shall take effect from and after its passage.

CHAPTER II

PRECEDENTS OF PLEAS.

SECTION I.

Indictment for usury, and judgment record thereon.

MIDDLESEX, (*to wit*,) Be it remembered, that at the general quarter-sessions of the peace of the lady the queen, holden for the county of Middlesex at Hicks Hall in Saint John Street in the county aforesaid, on Friday in the week next after the feast of the Epiphany, to wit, the twelfth day of January in the third year of the reign of our lady Ann, by the grace of God, of England, Scotland, France and Ireland queen, defender of the faith, &c. before James Mundy, sergeant at Law, Ralf Bucknall, Francis Tyssen, Thomas Owen, Edmund Prideaux, Joseph Offley, John Herbert, Nicholas Woolstenholme, John Perry, Martin Ryder, Richard Woodward and others, their fellows justices of the said lady the queen, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanours committed in the same county, by the oath of William Rathbone, George Bishop, Laurence Crosse, William Smith, Peter Sparks, Robert Bending, William Smart, Edward Hicks, Anthony Fryer, John Farren, John Sutton, Nicholas Meeter, Edward Davenport, Richard Hale, Jeremiah Mason, Thomas Derry, Thomas Ward, Peter Sharp, Moses Wilkinson, Robert Pitts, Nahum Crossley, and Thomas Beauman, honest and lawful men of the county aforesaid, then and there sworn and charged to inquire for the said lady the queen for the body of the county aforesaid, it is presented, that Dorothy Smith, late of the parish of Saint Clement Danes in the county of Middlesex, widow, on the 20th day of August in the third year of the reign of the lady Ann, by the grace of God, queen of England, &c. at the parish aforesaid in the

county aforesaid, lent and advanced to one Richard Jones, the sum of £5, of lawful money of England, to be paid to the said Dorothy upon the 8th day of January from thence next following in the year abovesaid. And the same Dorothy Smith, afterwards, to wit, on the said 8th day of January, in the year abovesaid, at the parish aforesaid, in the county aforesaid, unjustly and corruptly received and had of the said Richard Jones, for deferring and giving day of payment of the said sum of £5, for the time aforesaid, twelve shillings and sixpence of lawful money of England, which said sum of 12s. 6d. by the said Dorothy so as aforesaid of the said Richard received and had for deferring and giving day of payment of the said sum of five pounds for the time aforesaid, exceedeth the sum of six pounds by the £100, for one whole year, contrary to the form of the statute in such case made and provided, and against the peace of the said lady the now queen, her crown and dignity; wherefore the sheriff of the county of Middlesex is commanded, that he do not omit, &c. but that he cause the said Dorothy Smith to come to answer, &c. Upon which afterwards, to wit, at the same general quarter-sessions of the peace of the said lady the queen, held for the county aforesaid at Hicks Hall aforesaid in the county aforesaid, on the said Friday the 12th day of January in the third year of the reign of the said lady the queen abovesaid, before the said justices of the said lady the queen and others, their fellows aforesaid, cometh the said Dorothy Smith in her proper person, and having heard the indictment aforesaid, the same Dorothy saith, that she is not guilty thereof, and of this she puts herself upon the country: and Simon Harcourt, Esq., clerk of the peace of the county aforesaid, who prosecutes for the said lady the queen in this behalf, likewise &c. Therefore let a jury thereupon come before the justices of the said lady the queen, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the same county, and who, &c. to recognize, &c. because, &c. the same day is given as well to the said Simon Harcourt who prosecutes, &c. as to the said Dorothy Smith, here, &c. Whereupon at the next general sessions of the peace of the said lady the queen, holden for the county aforesaid at Hicks Hall aforesaid in Saint John Street aforesaid in the county aforesaid, to wit, on the 26th day of February in the 3d year of the reign of the said lady the queen abovesaid, before Joseph Offley, John Herbert, John Bond, John Crosbie, Benjamin Hilton, esquires, and others, their fellows, justices of the said lady the queen, assigned to keep the peace in the county aforesaid, and also to hear

and determine divers felonies, trespasses, and other misdemeanours committed in the same county, come as well the said Simon Harcourt, who prosecutes, &c. as the said Dorothy Smith, in their proper persons; and the jurors of the jury impannelled by the said sheriff for this purpose, to wit, Nathaniel Chandler, William Gunson, Robert Moore, William Giles, Robert Wheely, Edward Reynolds, Edward Hampsted, John Searle, William Ashman, Benjamin Mills, Richard Winch, and William Weaver, being called, sworn, who being chosen, tried and sworn to speak the truth of and concerning the premises aforesaid, say upon their oath, that the said Dorothy Smith is guilty of the premises aforesaid in the indictment aforesaid above specified, above laid to her charge in manner and form as by the indictment aforesaid is above supposed against her; whereupon all and singular the premises, being seen and understood by the court here, it is considered by the court here, that the said Dorothy Smith do pay to the said lady the queen the sum of £15 for her fine by the court here above laid upon her, according to the form of the statute in that case made and provided, for and by reason of the premises whereof she the said Dorothy Smith as aforesaid is convicted, and that she the said Dorothy Smith be taken, &c. which said Dorothy Smith being present here in court, by the court aforesaid, is committed to the New Prison of the said lady the queen, at Clerkenwell in the county aforesaid, there to remain until she shall pay the fine aforesaid &c. And now to wit, on Saturday next after one month of Easter in this same term, before the said lady the queen, at Westminster cometh the said Dorothy Smith in her proper person, who is committed to the marshal &c. and she immediately saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid against her the said Dorothy Smith, there is manifest error in this, to wit, that the indictment aforesaid against her, and the matter in the same contained, are not sufficient in law to warrant the judgment against her now given, or to convict her of the trespass and offence aforesaid; therefore in that there is manifest error: there is also error in this, to wit, that where by the record aforesaid it appears that judgment upon the indictment aforesaid was given against her the said Dorothy Smith in form aforesaid, that judgment, by the law of this realm of England, ought to have been given for the same Dorothy, that she be thereof acquitted, and go thereupon without day: therefore in that there is manifest error. And the said Dorothy prays that the judgment aforesaid for the errors being in the record and process aforesaid may be reversed and annulled, and absolutely be had for nothing; and that

she may be restored to the common law of this realm of England, and to all things which she hath lost upon the aforesaid occasion.

A writ of error of a judgment at the sessions for Middlesex at Hickes's Hall, upon an indictment upon the statute of usury: and Mr. Eyre assigned for error, that the justices at sessions had no jurisdiction of usury by the statute. 12 *Car.* 2 *c.* 13. And upon looking into the statute, the court were of the opinion, and reversed the judgment. *Smith* v. *Regina, Lord Raymond*, 1144.

It will be observed that the statutes of the several states which provide for the punishment of usury by indictment, directly specify the courts in which the same may be tried, and with such correction in that respect as must necessarily be made, it is supposed the precedent here given is sufficient. It is copied from 3 *Lord Raymond's R.* 36.

SECTION II.

Plea of usury.

And the said C D, by E F his attorney, comes and defends the wrong and injury, when, &c.; and says, that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, (*or indenture*, &c.,) because he says, that before the making the said writing in the said declaration mentioned, to wit, on the said —— day of ——, in the year of our Lord ——, at, &c. aforesaid, it was corruptly and against the form of the statute, in that case made and provided, agreed by and between the said A B and the said C D, that the said A B should lend and advance unto the said C D the sum of $100 of lawful money of the United States, and that the said A B should forbear and give day of payment thereof to the said C D until and upon the —— day of ——, in the year of our Lord ——, then next ensuing, and that the said C D, for the loan of the said sum of $100, and for giving day of payment thereof as aforesaid, for the time aforesaid, should give and pay to the said A B, on the said —— day of ——, in the year of our Lord —— aforesaid then next ensuing, the sum of $8 of like lawful money, making, together with the said sum of $100 so to be lent and advanced by the said A B to the said C D as aforesaid, the said sum of $108, in the said condition mentioned, and also that the said C D should pay to the said A B interest on the said sum of $108, from the —— day of , A. D. ——

aforesaid, until the time of the payment of the said sum of $108, in the said condition mentioned, and that for securing the payment of the said sum of $108 with interest for the same as aforesaid, to the said A B, he the said C D should make and seal, and as his act and deed deliver to the said A B, a certain writing obligatory, and should thereby bind himself in the penal sum of $500, conditioned for the payment of the said sum of $108 by him the said C D unto the said A B, on the said —— day of ——, in the year of our Lord —— aforesaid then next ensuing, with interest, for the said sum of $108 in the mean time as aforesaid, to be paid quarterly, to wit, at &c., aforesaid. And the said C D in fact further saith, that in pursuance of the said corrupt and unlawful agreement so made as aforesaid, the said A B afterwards, to wit, on, &c., aforesaid, to wit, at &c., as aforesaid, lent and advanced to the said C D the said sum of $100; and that for the securing the repayment thereof, together with the said sum of $8, so to be paid and given to the said A B as aforesaid, for the purpose aforesaid, on, &c., aforesaid, then next ensuing, with interest in the mean time as aforesaid, to be paid quarterly, as well for the said sum of $100 so lent and advanced as aforesaid, as for the said sum of $8, so to be given and paid to the said A B as aforesaid, for the purpose aforesaid; he the said C D, in further pursuance of the said corrupt and unlawful agreement then and there, to wit, on, &c., aforesaid, at, &c., aforesaid, made and sealed, and as his act and deed delivered to the said A B, the said writing in the said declaration mentioned, and the said A B then and there accepted and received the said writing, with the said condition thereunder written, of and from him the said C D, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. And the said C D avers that the said sum of $8, so as aforesaid agreed to be given and paid to the said A B, for the purpose aforesaid, and the interest of the said sum of $108 so reserved and made payable to the said A B, by the said condition of the said writing as aforesaid, exceeds the rate of $7 for the forbearing and giving day of payment at $100 for one year, contrary to the form of the statute in such case made and provided; by means whereof, and by force of the said statute, the said writing obligatory was and is wholly void in law. And this he, the said C D, is ready to verify; wherefore he prays judgment, if he ought to be charged with the said debt by virtue of the said writing obligatory (*or indenture*, &c.)

SECTION III.

Another plea of usury.

Although usury may be given in evidence under the general issue, in actions of assumpsit, still, if the defendant wish to avail himself of the testimony of the plaintiff, under the New York act of 1837, it must be made the subject of a special plea; or, what is equivalent thereto, he must give notice specially of the usurious contract he intends to prove by the plaintiff's testimony. 3 *Hill*, 564. 4 *Ibid.* 35

Endorsee *v.* Drawer or Acceptor;—That plaintiff discounted the bill on usurious terms.

The defendant, by —— his attorney, as to the said [first] count, saith, that at the time of the making of the unlawful agreement hereinafter mentioned, the said bill of exchange in the said first count mentioned, had more than three months to run[1] before the same would become due according to the tenor and effect thereof; and that after the making of the said bill, to wit, on, &c. [*the exact day if possible*], it was corruptly, and against the form of the statute in such case made and provided, agreed by and between *the plaintiff* and the defendant, that the plaintiff should lend and advance to the defendant a certain sum of money, to wit, the sum of £——, and that the said plaintiff should forbear and give day of payment of the said sum of £——, from the time of lending and advancing the same until a certain day, to wit, on, &c. [*that is, the day on which the bill became due*], and that for forbearing and giving day of payment of the said sum of £——, the defendant should pay to the plaintiff a certain sum of money, to wit, the sum of £——, and that for securing the repayment of the said sum of £——, together with the said sum of £——, on the said —— day of ——, A. D. ——, the defendant should endorse and deliver to the plaintiff the said bill of exchange in the said first count mentioned, and the defendant saith that in pursuance of the said unlawful agreement the plaintiff did afterwards, to wit, on the said —— day of —— A. D. ——, lend and advance the said sum of £—— to the defendant, and the defendant did then, for securing the repayment of the said last mentioned sum, as also the payment of the said sum of £——, on the said —— day of —— A. D. ——, as aforesaid, en-

[1] This is not material, as it refers to the English act.

dorse and deliver the said bill of exchange to the plaintiff, and the plaintiff received the same upon the terms aforesaid; and the said defendant further saith, that the said sum of £——, so agreed to be given and paid to the plaintiff for such loan and forbearance, exceeds the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided, whereby and by force of such statute the said bill was and is wholly void; and this the defendant is ready to verify, &c. *Chitty.*

A general form of plea of usury, not showing the time of forbearance and exact sum lent and forborne, is bad on special demurrer. *Hill* v. *Montagu*, 2 *M. & Sel.* 377. In *Fox* v. *Keeling*, it was held, that in a declaration for usury the day from which the forbearance is to commence must be alleged and proved precisely as stated, although laid under a *videlicet*, and if a different day is proved, or no day at all is proved, it is not sufficient.

In that case usurious interest was alleged to have been taken on the renewal of a bill; and the contract to forbear and the forbearance were alleged to have been from the time of making the agreement for renewal until the second bill became due: but no evidence was given of any precise day on which the transaction took place: *Held*, that the usury was not sufficiently made out. On *demurrer* to a declaration framed on a contract, which was in terms a purchase of an annuity of £20 for sixty years, for the price of £200, the court decided that they would not *infer* usury, and that the defendant should have *pleaded* it. *Ferguson* v. *Sprang*, 1 *Adol. & E.* 576.

SECTION IV.

Plea to an action by the payee of notes;—that they were given in payment of the arrears of an annuity usuriously granted.

And for a further plea in this behalf, the defendant saith, that before the making of the said supposed promissory notes in the said first and second counts mentioned, or either of them, to wit, on, (&c.) it was corruptly and against the force of the statute in such case made and provided, agreed by and between the plaintiff and one E F, that the plaintiff should lend and advance to the said E F, a certain sum of money, to wit, the sum of £646 10s., and that the said E F should repay the same, and interest for the forbearance thereof, to be computed at and after a rate greater than the rate of £5, for the forbearance of £100 for a year, by and under the contrivance, color and

pretence of the payment to the plaintiff of a certain annuity of £105 16s., to be thereafter payable by the said E F to the plaintiff, for and during the term of nineteen years, and one quarter of another year, commencing from, (&c.) being the day on which the said sum of £646 10s. was to be lent and advanced as aforesaid, by four even quarterly payments, such payments to be made on (&c.) in each and every year during the said term of nineteen years and one quarter of a year; and the defendant further saith, that in pursuance of the said corrupt and unlawful agreement, before the making of the said promissory notes, or either of them, to wit, on the said (&c.) the plaintiff did lend and advance to the said E F the said sum of £646 10s., and by a certain indenture then made between the said E F of the first part, the plaintiff of the second part, and J S G of the third part; (which said indenture, sealed with the seal of the said E F, being in the possession of the plaintiff, the defendant cannot bring the same here into court, the date whereof is the day and year last aforesaid;) the said E F, in consideration of the said sum of £646 10s. to him paid, did grant and covenant to pay to the plaintiff the said annuity, payable in the manner above mentioned, for and during the term of nineteen years and one quarter of another year, commencing from the day in which the said sum of £646 10s. was so lent and advanced by the plaintiff as aforesaid, contrary to the form of the statute in such case made and provided; and the defendant further saith, that after the making of the said indenture, and before and at the time of the making of the said supposed promissory notes in the said first and second counts mentioned, there was in arrear to the plaintiff, for and on account of the said annuity, upon the said indenture, a large sum of money, to wit, the sum of £55 6s., for and on account of which said sum of £55 6s., the defendant made and delivered to the plaintiff the said supposed promissory notes in the said first and second counts mentioned, and the plaintiff took and received the said promissory notes of and from the defendant for and on account of the said sum of £55 6s., the said arrears of the said annuity, and the defendant made and delivered to the said plaintiff the said promissory notes upon no other account or consideration whatever, and the defendant avers that the said interest on the said sum so advanced, exceeds the rate of £5 for the forbearance of £100 for a year, contrary to the said statute; and this the defendant is ready to verify, &c.

SECTION V.

Qui tam declaration for usury.

——— County, to wit: W M was summoned to answer W H, as well for the [*People, or State of* * * * * *] as for himself in this behalf of a plea, that he render to the [*People, State or Treasurer of* * * * * *] and to the said W H, who sues as aforesaid, the sum of [*double value, or full value as the statute directs*] lawful money of the United States of America, which he owes to, and unjustly detains from them, &c. And thereupon the said W H, who sues as aforesaid by ——— his attorney, complains, that heretofore, to wit, on the first day of January, in the year of our Lord One Thousand Eight Hundred and Forty-Three, at [*place of the contract*] upon a certain corrupt contract then and there made between the said W M and P H and T B, against the form of the statute [*here refer to the statute distinctly*] the said W M did then and there lend and advance to the said P H and T B, a certain sum, to wit, the sum of one hundred dollars; and that the said W M did also, afterwards, to wit, on the fifteenth day of January, in the year aforesaid, upon the said corrupt contract, lend and advance to the said P H and T B, the further sum of fifty dollars, to wit, at [*place of loan.*] And the said W H further saith, that the said W M, wholly disregarding the statute aforesaid in such case made and provided, did afterwards, to wit, on the first day of January, one thousand eight hundred and forty-four, at [*place where the money was received*] upon the said corrupt contract so made as aforesaid, take, accept and receive of and from the said P H and T B, a certain sum of money, to wit, the sum of twenty dollars of lawful money of the United States of America, by way of corrupt bargain and loan, for the said W M's forbearing and giving, and having forborne and given day of payment of the said two several sums of one hundred dollars, and of fifty dollars, so lent, and advanced as aforesaid from the respective days and times of lending and advancing the same as aforesaid, until and upon the said first day of January, one thousand eight hundred and forty-four as aforesaid, which said sum of twenty dollars so taken, accepted and received by the said W M, in manner and for the cause aforesaid, exceeds the rate of [*statutory rate*] for forbearing of one hundred for a year, contrary to the form of the statute in such case made and provided and before referred to. Whereby and by force of the said statute, the said W M forfeited for his

said offence the sum of [*full or double value as the case may be*] being the ——— value of the sum of one hundred and fifty dollars so lent and advanced and forborne by the said W M as aforesaid. And thereby and by force of the statute in such case made and provided and before referred to, an action hath accrued to the said W H, who sues as aforesaid to demand and have for the [*People, State or Treasurer of* * * * * * *] and for himself in this behalf, of and from the said W M, the said sum of ——— dollars, so forfeited as aforesaid and above demanded. Yet the said W M, (although often requested, &c.) hath not as yet, rendered either to the [*People, State or Treasurer of* * * * * * *] or to the said W H, who sues as aforesaid, the said sum of money above demanded, or any part thereof; but hath hitherto wholly refused and neglected so to do; and therefore, as well for the said [*People, State or Treasurer of* * * * * * *] as for himself in this behalf, the said W H brings his suit, &c.

SECTION VI.

Declaration by an informer.

In the ——— on the —— day of ——— A. D. ——— to wit: A B, who sues as well for ——— as for himself, in this behalf, by E F, his Attorney, [or, "in his own proper person,"] complains of C D, who has been summoned to answer the said A B, in an action of trespass on the case, and therefore the plaintiff who sues as aforesaid, brings his suit. For that the defendant heretofore, to wit, on the ——— day of ——— A. D. ———, [*the day the usurious interest was received, but the exact day is not material,*] upon a certain corrupt contract made, to wit: on &c., [*the exact day from which the forbearance was to commence*], between the defendant and one G H, took, accepted and received of and from the said G H, a certain sum of money, to wit, the sum of $——, by way of corrupt bargain for the defendant forbearing and giving, and having forborne and given day for payment of a certain sum of money, to wit, the sum of $—— theretofore, to wit, on the [day and year last aforesaid,] lent and advanced by the defendant to the said G H for a long time, to wit, from the day and year last aforesaid, until and upon the said ——— day of ———, A. D. ———, which said sum of $—— so taken, accepted and received by the defendant of and from the said G H, in manner and for the cause aforesaid, exceeds the rate of $——

for the forbearing of $100 for a year, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for the said offence, the sum of $——, being the ——— value of the said sum of $——, so lent and advanced by the defendant to the said G H, and so forborne as aforesaid, and thereby and by force of the said statute, an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have for ——— and for himself in this behalf, of and from the defendant, the said sum of $—— above demanded; yet the defendant hath not paid the said sum above demanded, or any part thereof, to ——— and to the plaintiff, who sues as aforesaid, or either of them, and therefore the plaintiff brings his suit, &c.

Plea to debt for a penalty for usury;—denial of the usurious contract.

And for a further plea in this behalf, the defendant says that no such corrupt and unlawful contract as in the said declaration mentioned, was made or entered into between the defendant and the said T C, in manner and form as in the said declaration is alleged; and of this the defendant puts himself upon the country, &c.

Denial of the receipt of the usurious interest.

And for a further plea in this behalf, the defendant says that he, the defendant, did not, in pursuance of the said corrupt and unlawful contract in the said declaration mentioned, take, accept or receive of or from the said T C, the said sum in that behalf mentioned, by way of corrupt bargain and loan, for the defendant having forborne and given day of payment of the said sum of money in that behalf mentioned in the said declaration, in manner and form as in the said declaration is alleged; and of this the defendant puts himself upon the country, &c.

INDEX.

A.

PAGE

Acceptor of bills,—may charge for advances in certain cases, . 52
Account settled purges usury, ... 33
Accepting bills, when charges may be for, ... 57
Accommodation note, endorser of, cannot charge more than legal interest if he advanced the money, ... 53
Action qui tam for usury, ... 125
Action qui tam, accruing of, ... 126
Action qui tam, process and pleadings in, ... 129
Action qui tam, compounding of, ... 137
Action qui tam, evidence in, ... 137
Action qui tam, consequence of, ... 139
Advance of goods instead of money, ... 42
Advance on a discount of negotiable paper not usury, being allowed as a usage of trade, ... 58
Agreement, traverse of corrupt, how it must be made, . . . 112
Alabama, statutes of 1805 and 1818, ... 11
Alabama, statutes of, in force, ... 151
" Usury of 1818, ... 154
" Decisions, ... 154
Amendments cannot be made without terms, ... 113
Amendment in action qui tam, ... 136
Annuity, leading cases of, ... 38
Animus quo in an action qui tam, ... 133
Anne, statute of, ... 149
Arkansas, statute of, ... 160
Assignee of a decree in chancery cannot recover more than is due thereon, by any agreement of the seller, ... 61
Assignee in bankruptcy may plead usury, ... 107
Attorney's charges, when none are incurred, may be a color for usury, 56
Attorney not privileged from testifying on usurious contract, . 114

B.

Bailee for usury, may be sued in trover or replevin, ... 111

Bank bills, uncurrent, imposed upon a borrower, usurious, . 45
" to be kept in circulation, in addition to interest paid, usury, 49
" sale of, ... 79
Bank stock, loan of, subject to depreciation, not usury, if to be returned in kind, ... 36
Banks issuing post notes, not usury, ... 59
Bankers, when they may charge more than legal interest, . 58
Bankrupt, creditor of, cannot have dividend on usurious claim, . 89
Bankruptcy, assignee in, may plead usury, ... 107
Bills, acceptor of, may charge for advances in certain cases, . 52
Bills and notes, discounting and negotiating of, ... 57
Bona fide contract, made after a usurious contract, ... 91
Bond to indemnify a surety, ... 102
Bond and mortgage, sale of, with guaranty, not a loan, . . 62
Borrower, privies in blood, representation, and estate, of the, may plead usury, ... 107
Borrower at usury, not in pari delicto with the lender, . . 113
Borrower may recover excess of interest at common law, . 143
Bottomry, principles of, ... 33
Broker may charge for advances and for transacting business, . 53
Brokerage, extra sum allowed for, ... 51
Brokerage cannot be claimed by lender, ... 51

C.

Cash and credit price of property, ... 71
Certificates of deposite, payable at a future day, are not void for usury, if issued at the request of the borrower, ... 59
Change of securities, between parties to the usury, void, . . 92
Charles II., statute of, 1660, ... 2
Charges, mercantile, if customary, not usurious, ... 54
Charge for obtaining money at a bank, if reasonable, not usury, 55
Charge for providing funds to meet another's draft, not usury, . 55
Charges, mercantile, may be a color for usury, ... 56
Charges of an attorney, when none are incurred, may be a color for usury, ... 56
Charge, to cover the expenses of an agent, when none is employed, usurious, ... 56
Charge of lender for advancing in addition to interest, usurious, . 57
Circulating bank bills, in addition to interest, usury, . . 49
Colorable hazard evidence of usury, ... 34
Commissions, Lord Ellenborough's remarks on, ... 51
" when they may be charged on bills and notes, . 57
Common law action by borrower, for excess of interest, . . 143
Compelling borrower to endorse drafts on others, held usurious, . 35
Complainant's bill may prove defendant's plea, ... 114
Compound interest, when it may be taken, ... 67
Compound interest, special cases in which it may be charged, . 68

Compound interest, against trustee in gross delinquency, . . . 69
Compound interest, legatees entitled to, on funds withheld, . 70
Compounding of an action qui tam, ... 137
Compromise purges usury, ... 33
Conflict of laws, general principles of, ... 13
Conclusion of declaration in qui tam, ... 135
Connecticut, statute of 1715, ... 8
" statute of, in force, ... 162
" statute of, decisions on, ... 163
" decisions on action qui tam, ... 140
Consequence of an action qui tam, ... 139
Contingency, if slight, will not take the case from the statute, . . 35
Contingent loan of money may be usurious, ... 41
Contingent rise of stock beyond principal secured, usury, . . 47
Contracts, illegal,—Johnson's remarks on, ... 21
" " Tucker's remarks on, ... 22
" what are, and are not usurious, ... 30
" existing previous to the statute, ... 30
" usurious, consequence of, ... 87
" " parties to, ... 87
" bona fide, made after usurious contract, ... 91
" usurious, made after valid contract, ... 97
" of forbearance, substance of, in qui tam, ... 134
Co-obligor may plead usury, ... 107
Corrupt agreement, traverse of, how it must be made, . . . 112
Credit, sale of one's, by endorsement or guaranty, lawful, if unconnected with a loan, ... 54
Creditor of bankrupt cannot have dividend on usurious claim, . 89

D.

Damages stipulated, not usury, ... 40
Days of grace, discount upon, not usury, ... 60
Debt, valid, not destroyed by subsequent usurious security, . 98
Debt, to whom forborne, must be stated in an action qui tam, . 133
Decisions on qui tam action, Connecticut, ... 140
" Massachusetts, ... 140
" New York, ... 143
" North Carolina, ... 140
" Vermont, ... 142
" in England, ... 142
Decisions on statutes of Alabama, ... 154
" Connecticut, ... 163
" Indiana, ... 178
" Kentucky, ... 179
" Louisiana, ... 191
" Maine, ... 195
" Maryland, ... 197
" Massachusetts, 1783, ... 202

Decisions on statutes of Massachusetts, 1825, ... 206
" New Hampshire, ... 214
" New Jersey, ... 217
" New York, ... 225
" North Carolina, ... 256
" Pennsylvania, ... 263
" South Carolina, ... 270
" Tennessee, ... 278
" Vermont, ... 280
" Virginia, ... 285
Declaration, conclusion of, in qui tam, ... 135
Deed, may be impeached by parol evidence, ... 114
Defence of usury, who may set up, ... 106
Deposite, usurious, trover may be maintained for, ... 111
Delaware, statute of, in force, ... 171
Discounting and negotiating bills and notes, ... 57
Discounting a bill for ready money and not paying it, usury, . 57
Discovery of usury, how to be obtained, ... 121

E.

Elizabeth, statute of, ... 146
Ellenborough's, Lord, remarks on commissions, ... 51
Endorsement of a usurious note, void, though endorser ignorant of the usury, ... 65
Endorser of accommodation note cannot charge more than legal interest, if he advanced the money, ... 53
Endorser or guarantor may charge for becoming such, if unconnected with a loan, ... 54
English, recent, decisions on action qui tam, ... 142
Equity, relief in, ... 117
Equity, how usury must be pleaded in, ... 118
Errors excepted in account settled, purges usury, . . . 33
Erskine's principles of lex situs, ... 19
Evidence of usury, ... 113
Evidence, parol, admissible to impeach a deed, ... 114
Evidence in action qui tam, ... 137
Excess of interest in qui tam, ... 135
Excess over legal interest may be recovered at common law. . 143
Exchange of notes usurious, if a contrivance to evade the statute, . 52
Exchanged note, to raise money, may be sold as a chattel, . 59

F.

Facts proved, without charge of usury, may be construed as such, . 115
Firm, notice of usury to one, notice to all, ... 89
Florida, statute of, in force, ... 172
Forbearance, to whom, must be stated in an action qui tam, . 133

Forbearing, substance of contract in qui tam, ... 134
Foreign bill, return of, under protest, charges on, . . 57
Foreign funds, sale of, ... 76
Foreign laws must be proved as alleged, ... 114

G.

General notice, not sufficient under act of 1837, ... 115
George Third, statute of, 1818, ... 9
Georgia, statute of, 1759, ... 11
" in force, ... 174
German interest, ... 4
Goods, advance of, instead of money, ... 42
Goods forced upon an applicant for loan, considered a loan, . 42
Goods, voluntary purchase of, not usury, ... 43
Goods received as interest, ... 47
Goods, pledge of, may be usurious, though borrower not liable to pay, 49
Grecian and Chinese interest, ... 3
Guarantor or endorser may charge for becoming such, if unconnected with a loan, ... 54
Guaranty on sale of a bond and mortgage not a loan, . . . 62

H.

Hazard, general principles of, ... 33
" if colorable, no exemption, ... 34
" classes of, ... 37
Henry VIII., statute of, ... 144
History of usury, ... 1

I.

Illegal contracts, Johnson's remarks on, ... 21
" Tucker's remarks on, ... 22
Illegal interest reserved by mistake, ... 32
Illinois, statute of, in force, ... 175
Indemnification of a surety, ... 102
Indiana, statute of, in force, ... 177
" decisions on, ... 178
Indictment and record of conviction for usury, ... 300
Injunction, when it will be granted, ... 117
Insurance exempt from usury, ... 34
Insurance Company may charge for insurance in addition to the interest on a loan, ... 57
Interest, rate of, in 1490, ... 2
" Spanish, in 1490, ... 2
" Grecian and Chinese, ... 3
" German, ... 4

Interest, paid in goods, ... 47
" compound, when it may be taken, ... 67
" " special cases in which it may be charged, . 68
" " against trustee, in gross delinquency, . 69
" " legatees entitled to, on funds withheld, . . 70
" the difference between cash and credit price of property, when, ... 71
" receipt of, evidence of a loan, ... 114
" excess of, in qui tam, ... 135
" excess of, may be recovered at common law, . . 143

J.

James I., statute of, 1623, ... 2
Johnson, J., remarks on illegal contracts, ... 21
Judaismo, statute of, 1290, ... 1
Judgment on warrant of attorney may be set aside, on motion, for usury, ... 112

K.

Kentucky, statute of, 1798, ... 12
" in force, ... 179
" decisions on, ... 179

L.

Land, imposed upon a borrower, as part of a loan, usury, . . 43
Land, rent of, reserved for interest, ... 48
Land, cash and credit price of, ... 71
Land, contracts governed by its own law, ... 84
Laws, conflicting, general principles of, ... 13
Laws, foreign, must be proved as alleged, ... 114
Legatees entitled to compound interest on funds withheld, . . 70
Lender cannot claim brokerage, ... 51
Lender may charge for services and expenses, bona fide incurred, 51
Lender cannot recover on notes pledged to secure a usurious loan, 61
Letters may be read in evidence in certain cases, ... 114
Lex situs, Erskine's principles of, ... 19
Lex loci contractus, Judge Martin's remarks on, ... 27
Lex loci contractus, ... 82
Lives, risk of, ... 34
Loan may be proved by receipt of interest, ... 114
Louisiana, statute of, in force, ... 190
" decisions on, ... 191

M.

Maine, statute of, in force, ... 194
" decisions on, ... 195

Maryland, statute of, in force, ... 196
" decisions on, ... 197
Massachusetts, statutes of, 1641 and 1783, ... 8
" decisions on action qui tam, ... 140
" statute of, in force, ... 201
" " 1783, decisions on, ... 202
" " 1825, decisions on, ... 206
Mercantile charges, if customary, not usurious, ... 54
" may be a color for usury, ... 56
Merton, statute of, 1235, ... 1
Michigan, statute of, in force, ... 208
Mississippi, " " 209
Missouri, " " 211
Mistake no evidence of usury, ... 33

N.

New Hampshire, statute of, in force, ... 212
" " decisions on, ... 214
New Jersey, statute of, 1738, ... 10
" " in force, ... 216
" " decisions on, ... 217
New York, statutes of, 1717 and 1737, ... 8
" decisions on action qui tam, ... 143
" statute of, in force, ... 222
" " decisions on, ... 225
North Carolina, statute of, 1741, ... 11
" decisions on action qui tam, ... 140
" statute of, in force, ... 255
" " decisions on, ... 256
Notes, exchange of, usurious, if a contrivance to evade the statute, . 52
Notes, negotiating and discounting of, ... 57
Note, accommodation, endorser of, cannot charge more than legal interest if he advanced the money, ... 53
Notes, exchanged to raise money, may be sold as a chattel, . 59
Notes, pledged to secure a usurious loan, cannot be recovered on by the lender, nor by a person receiving them from the lender, . 61
Note, given to a sheriff collaterally, to secure an execution, may be sold as a chattel, ... 64
Note, usurious, endorsement of, void, though endorser ignorant of the usury, ... 65
Note, valid, perverted to usurious claims, cannot be recovered on, 65
Note, party to, not competent witness, ... 115
Notice of usury, to one of a firm, notice to all, ... 89
Notice, general, not sufficient under act of 1837, ... 115

O.

Ohio, statute of, 1795, ... 12
" " in force, ... 261

P.

Parol evidence admissible to impeach a deed, ... 114
Parties to usurious contracts, consequence of, ... 87
Partnership profits may be measured in any way agreed on, . 35
Party to a note, not competent witness, ... 115
Penalty, ... 39
Pennsylvania and Delaware, statute of, 1700, ... 10
Pennsylvania, statute of, in force, ... 262
" decisions on, ... 263
Plea of usury, replication to, ... 112
Plea of defendant may be proved by complainant's bill, . . 114
Pleas of usury, ... 303
Pleading usury at law, rules for, ... 110
Pledge of goods may be usurious, though borrower not liable to pay, 49
Principles, general, of conflicting laws, ... 13
Principles, Erskine's, of lex situs, ... 19
Practice of calculation adopted and acquiesced in, no evidence per. se of usury 33
Post-Obits, ... 37
Post notes issued by banks not usurious, ... 59
Principal need not be tendered in trover or replevin for usury, . 111
Privies in blood, representation, and estate of the borrower, may plead usury, ... 107
Privilege of attorney does not extend to usurious contract, . 114
Process and pleadings in an action qui tam, ... 129
Prompt payment, ... 66
Public securities, sale of, ... 80
Punishment of usury, ... 126
Purchaser of a borrowed note at usurious discount cannot maintain an action against the maker, ... 63
Purchaser at usury of a guaranteed bond, may recover against the obligor, though guaranty usurious, ... 63

Q.

Qui tam action for usury, ... 126
" " accruing of, ... 126
" " process and pleadings in, ... 129
" time of the action, ... 131
" the animus quo, ... 133
" debt forborne, to whom must be stated, ... 133
" excess of interest in, ... 135
" conclusion of declaration in, ... 135
" amendment in action of, ... 136
" action, compounding of, ... 137
" " evidence in, ... 137
" " consequence of, ... 139

Qui tam action, Connecticut, decisions on, ... 140
" " Massachusetts, decisions on, ... 140
" " North Carolina, decisions on, ... 140
" " New York, decisions on, ... 143
" " Vermont, decisions on, ... 142
" " recent English decisions on, ... 142

R.

Receipt of interest evidence of a loan, ... 114
Redemption, at the option of the borrower, ... 39
Relief in equity, ... 117
Remitting bills, when charges may be for, ... 57
Rent charge usurious, though principal in hazard, ... 34
Rent charge, leading cases of, ... 38
Rent of land reserved for interest, ... 48
Replication to a plea of usury, ... 112
Reservation of illegal interest by mistake, ... 32
Respondentia, not usury, ... 36
Return of foreign bill under protest, charges on, ... 57
Rhode Island, statute of, in force, ... 267
Roman usury, ... 3
Rules for pleading usury at law, ... 110

S.

Sale of securities not usury, without coercion, ... 40
Sale of one's credit by endorsement or guaranty lawful, if unconnected with a loan, ... 54
Sale of a bond and mortgage with guaranty, not a loan, . . 62
Sale of foreign funds, ... 76
Sale of bank bills, ... 76
Sale of public securities, ... 80
Securities, change of, between parties to the usury, void, . . 92
Securities, new, to a stranger, when good, ... 94
Security, usurious, no evidence of previous indebtedness, . . 98
Security void, no evidence of debt, ... 115
Services of negroes reserved for interest, ... 48
Settlement of account, when it purges usurious items contained in it, 33
Scire facias, usury no plea to, ... 112
Sheriff, note given to, collaterally to secure an execution, may be sold as a chattel, ... 64
Spanish interest in 1490, ... 2
Special cases in which compound interest may be charged, . 68
Statute of Merton, 1235, ... 1
" Judaismo, 1290, ... 1
" James I. of 1623, ... 2
" Charles II. of 1660, ... 2

Statute of William IV., ... 7
" Victoria, ... 7
" Henry VIII., ... 144
" Elizabeth, ... 146
" Anne, ... 149
" George III., 1818, ... 9
" Alabama, 1805 and 1818, ... 11
" " in force, ... 151
" " decisions on, ... 154
" Arkansas, ... 160
" Connecticut, 1715, ... 8
" " in force, ... 162
" " decisions on, ... 163
" Delaware, in force, ... 171
" Florida, in force, ... 172
" Georgia, 1759, ... 11
" " in force, ... 174
" Illinois, in force, ... 175
" Indiana, " 177
" Kentucky, 1798, ... 12
" " in force, ... 179
" Louisiana, in force, ... 190
" Maine, in force, ... 194
" Maryland, in force, ... 196
" Massachusetts, 1641 and 1783, ... 8
" " in force, ... 201
" Michigan, in force, ... 208
" Mississippi, in force, ... 209
" Missouri, in force, ... 211
" New Hampshire, in force, ... 212
" New Jersey, 1738, ... 10
" " in force, ... 216
" New York, 1717, ... 8
" " 1737, ... 9
" " in force, ... 222
" North Carolina, 1741, ... 11
" " in force, ... 255
" Ohio, 1795, ... 12
" " in force, ... 261
" Pennsylvania and Delaware, 1700, ... 10
" " in force, ... 262
" Rhode Island, in force, ... 267
" South Carolina, 1720, ... 11
" " in force, ... 270
" Tennessee, in force, ... 276
" " decisions on 278
" Vermont, 1797, ... 8
" " in force, ... 280

Statute of Vermont, decisions on 280
" Virginia, 1730, ... 11
" " in force, ... 284
" " decisions on 285
Stipulated damages not usury, ... 40
Stock, bank, loan of, not usury, if to be returned in kinds, . . 36
" voluntary purchase of, not usury, ... 43
" imposed upon the borrower at more than its value, usury, . 44
" transfer of, ... 45
" transfer of, when usurious, ... 46
" contingent rise of, beyond principal secured, usury, . 47
Strangers to the usury may recover in certain cases, ... 90
Substance of contract of forbearing in qui tam, ... 134
Surety may charge for becoming such, ... 52
Surety, indemnification of, ... 102

T.

Tender, not necessary in trover or replevin for usury, . . 111
Tennessee, statute of, in force, ... 276
" decisions on, ... 278
Testimony of party to a note, incompetent, ... 115
Time, calculated by general custom, not per se evidence of usury, . 33
Time, in an action qui tam, ... 131
Transfer of stock, ... 45
Transfer of stock, when usurious, ... 46
Traverse of corrupt agreement, how it must be made, . . 112
Trover may be maintained for usurious deposit, ... 111
Trustee liable for compound interest on funds used, . . . 68

U.

Uncurrent bank bills imposed upon a borrower, usurious, . 45
Usury, history of, ... 1
" against the canon and common law, . . . 1
" Roman, ... 3
" result of, ...
" what necessary to constitute, ... 84
" notice of, to one of a firm, notice to all, ... 89
" strangers to, may recover in certain cases, ... 90
" defence of, who may set up, ... 106
" how it must be pleaded at law, ... 109
" bailee for, may be sued in trover or replevin, . . . 111
" cannot be pleaded to a scire facias, ... 112
" replication to a plea of, ... 112
" evidence of, ... 113
" how it must be pleaded in equity, ... 118
" discovery of, how to be obtained, ... 121

Usury, punishment of, ... 126
" qui tam action for, ... 126
Usurious contracts, what are and are not, ... 30
Usurious contract, consequence of, ... 87
Usurious contracts, parties to, ... 87
Usurious contract, or security after valid contract, ... 97
Usurious security no evidence of previous indebtedness, . . . 98
Usurious deposite, trover may be maintained for, ... 111

V.

Valid debt not destroyed by subsequent usurious security, . . 98
Vermont, statute of, 1797, ... 8
" in force, ... 280
" decisions on, ... 280
Victoria, statute of, ... 7
Virginia, statute of, 1730, ... 11
" in force, ... 284
" decisions on, ... 285
Vermont, decisions on, action qui tam, ... 142
Void, security, no evidence of debt, ... 115
Voluntary purchase of goods, not usury, ... 43
Voluntary purchase of stock, not usury, ... 43

W.

Warrant of Attorney, judgment on, may be set aside on motion for usury, ... 112
Where goods are advanced instead of money, ... 42
Where any extra sum is to be allowed for brokerage, . . . 51
Who may set up the defence of usury, ... 106
William 4th, statute of, ... 7

ERRATA.

Page 9, 17th line from top, for endorser, read endorsee.
" 9, 21st line from top, for endorser, read endorsee.
" 10, 9th line from top, for endorser, read endorsee.
" 19, 19th line from top, for logem, read legem.
" 23, 10th line from bottom, for in, read on.
" 23, 14th line from bottom, for mae, read made.
" 27, 9th line from bottom, for deliberatis destinatus, read deliberatio destinatur.
" 35, 1st line, after contingency, read Cro. Jac. 509.
" 31, 3d line from bottom, for occurred, read accrued.
" 42, 8th line from top, for receive, read reserve.
" 46, 17th line from bottom, for Rend., read Randolph.
" 91, 18th line from top, for 25 Johns, read 15 Johns.

DB ABO QUt
A treatise on the law of usury
Stanford Law Library
3 6105 044 204 522